CEIJ E-BOOKS

International Public Law Series: vol. 2

Contemporary issues of international responsibility in international law

Harold Biddle, Otto Garr, Brian King, Dimitris Liakopoulos, Cynthia Miller, Sylvie Neigh, Christian G. Sommer, Victorino F. Sola

CEIJ

International Public Law Series: vol. 2

Series Editions: CEIJ e-Books
US, Europe

Harold Biddle, Otto Garr, Brian King, Dimitris Liakopoulos, Cynthia Miller, Sylvie Neigh, Christian G. Sommer, Victorino F. Sola

Contemporary issues of international responsibility in international law

CEIJ e-Books

US, Europe

Harold Biddle, Otto Garr, Brian King, Dimitris Liakopoulos, Cynthia Miller, Sylvie Neigh, Christian G. Sommer, Victorino F. Sola

Series of International Public Law, vol.2

ISBN 978-02-0137-962-4 (eBook)
DOI:10.5281/zenodo.10572388; 10.5281/zenodo.10572464;10.5281/zenodo.10572489; 10.5281/zenodo.10572520; 10.5281/zenodo.10572582; 10.5281/zenodo.10572682; 10.5281/zenodo.10572728

Published by CEIJ e-Books, https://ceije-books.rf.gd/

© CEIJ e-Books and the authors 2024
No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Contents

Harold Biddle: International responsibility: states not materially injured and violation of erga omnes obligations…….1

Introduction to international liability and aggravated regime…….1

What are the obligations of a positive nature?……2

What are the obligations of a negative nature?……...4

(Follows): The possibility of adopting countermeasures……8

Legitimation and reaction against the violation of erga omnes obligations……9

(Follows): The legal interest……10

Damage and legal prejudice……..16

Obligation and right in international law. Crossing or distancing points?……21

States not materially harmed and adoption of countermeasures……...…28

Towards the institutionalization of an international order……41

Work of the ILC and responsibilities of states……..48

Concluding remarks……..56

References……61

Otto Garr: Are there customary rules in the area of unilateral sanctions?…...65
Introduction……...65
What are the constituent elements of an international custom?……74
Conclusions on the identification of customary law of 2018 through ILC's work...81
Customary rules and unilateral sanctions. Hypothetical approaches and questionable reconstructions……..87
Absence of customary rules and use of unilateral sanctions. The controversial medal and Art. 54 of the 2001 Project ……95
Customary rule that prohibits the use of sanctions of an extraterritorial nature…...99
Concluding remarks……101
References……...110

Brian King: Complicity of states, role of international organizations under Art. 58 DARIO……..126
Introduction……126
Configurability of the unlawful act by regulatory norm……128
(Follows) Responsibility of an international organization resulting from a third degree source……..134

Participation in the deliberative procedure as an hypothesis of complicity. The need to “isolate” state behaviour from the outcome of the procedure……143
(Follows) The conditions set by Art. 58 DARIO to the complicity of states in the offense deriving from the legislative act…….146
(Follows) States' participation in UN illicit……153
Responsibility profiles and compliance with arms transfer agreements. International state responsibility for provisions violation prohibiting arms transfers……..162
International criminal liability for crimes committed following arm transfers…...173
Criminalization of illicit brokering and deviation of the arms load (diversion)….178
Tools for compliance with the required obligations……184
Political significance of arms control agreements……..185
Provisional application of arms control agreements……...189
Compliance with agreements and mechanisms……...191
Concluding remarks……197
References……...200

Dimitris Liakopoulos: International responsibility, reparation for victims, wrongdoing of international organizations and disputes between individuals and states. Hypotheses and connections with illicit acts of organizations. What remedies, problems and solutions are proposed?……...216

Introduction…….216

The position of the ECtHR and attribution to the conduct…….223

What happens in the case of extraterritorial jurisdiction of states?……233

Adoption of internal measures and obligations of one's participation……241

Absence of margin of discretion and equivalent protection in the relevant jurisprudence……...242

State responsibility and margin of discretion……..251

Some criticisms of what we looked at and noted above…….257

Immunity of international organizations. Responsibilities and conduct……275

Failure to protect injured individuals and responsibility of organizations……..282

(Follows) Membership responsibilities……...285

Conduct of delegates within an organization and state responsibility……300

Listing and delisting procedures of the sanctions committees and representations of the UN Member States ……...306

(Follows) Jurisprudence of national and international courts and elements in practice……311
Government behavior in the sector of external relations with organizations……..317
Failure to adopt diplomatic measures, reparation for the offense committed and state responsibility……...325
Concluding remarks……331
References……...340

Cynthia Miller: Codification of armed conflicts and international responsibility. A work of the International Law Commission completed or under review?……359
Introduction……359
Where are draft articles applied in the field of armed conflict?……..361
What problems exist between responsibility and armed conflict? Is there a connection between them?……..364
No necessary termination or suspension as a general rule……..370
Evaluation of the conventional law that pre-exists the armed conflict……...374
Which treaties remain and in what areas?……...386

(Follows): Treaties on humanitarian law and those on the law of armed conflicts……...391
(Follows): Multilateralism in treaties and the normative nature of their content...396
(Follows): Treaties of friendship, navigation and commerce as agreements of private rights……400
(Follows): Human rights treaties……407
(Follows): Treaties relating to environmental protection at the international level……408
(Follows): International waterways, facilities and services and aquifers……...412
(Follows): Treaties establishing international organizations……...414
(Follows): Treaties relating to diplomatic and consular relations……...415
Conclusion of a treaty during the outbreak of an armed conflict……418
Intention to suspend, terminate, withdraw from a treaty……420
Fulfillment of obligations arising from international law……...427
Provisions of the treaty and severability thereof……429
Losing the right of extinction, recession, suspension of the operation of a treaty……434
The resumption of relations between states……436

What are the effects for the right of legitimate defense on treaties and its exercise? ……....438
Having an aggressor state benefit from conduct that goes against international law……...442
(Follows) The decisions of the UN Security Council…….444
Effects of armed conflicts on treaties. The principle of neutrality……..447
Adding other cases of withdrawal, extinction and suspension of treaties……...450
The progress of the project of articles under investigation…….452
Elements of codification, integration and evaluation for a codification attempt on the subject……456
Evaluate the work done to move forward into the future……458
References……...462

Sylvie Neigh: Accountability and international responsibility of the UN operations……...471
Introduction…….471
Peacekeeping, international operations, crimes and victim protection……...472

Remedies within the UN context. Commissions' claims and creation of local committees……..479
What happens with the practice? What kind of trend does it follow?…….485
Remedies over time: lights and shadows……490
Concluding remarks……493
References……...499

Christian G. Sommer and Victorino F. Sola: International responsibility and reparations in the Inter-American human rights system……..507
Preliminary notes……507
The international responsibility of states and respect for human rights……..511
Some general considerations on reparations in international law……...519
The reparations regime in the Inter-American human rights system……..522
Victims as recipients of reparations……527
The conceptual boundaries of the notion of integral reparation…….532
Non-pecuniary damages……..535
Property damage……..542

State reparation measures: adequately investigating, prosecuting, and punishing the facts that led to the violations……..547
Satisfaction measures……..555
Non-repetition measures…….562
Measures to adjust internal standards…….569
Some final thoughts…….576
References……...581

To our families

International responsibility: states not materially injured and violation of erga omnes obligations

DOI:10.5281/zenodo.10572388

Harold Biddle, post Ph.D, UK

Introduction to international liability and aggravated regime

When we talk about international responsibility and aggravated regime we refer to Articles 40 and 41 of the "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (DARSIWA). The text of Art. 41 of the Project affirms the following: "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. 2. No state shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law". With this article the mandatory norms of general international law are identified and

with greater interest the consequences resulting from the serious violation of an imperative norm are stated (Nollkaemper, D'Aspremont, Ahlborn, Boutin, Nedeski, Plakokefalos, Jacobs, 2020; Liakopoulos, 2020a)

Art. 41 DARSIWA provides for a series of solidarity obligations on all states. Speaking of obligations, we are referring to the cessation of the offense which does not recognize as lawful the situation created by the serious violation of the interests of the international community as well as the obligation not to provide assistance in maintaining this situation. The same article is without prejudice to further consequences deriving from international law following a serious violation of mandatory rules.

What are the obligations of a positive nature?

One of the first obligations established by Art. 41 DARSIWA is the responsibility of states to cooperate in relation to the illicit act of lawful means. However, the law does not regulate the modalities of the type of cooperation that must be carried out as well as the need to carry out it in an institutionalized environment. Thus it is specified that: "(…) because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should

take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-istitutionalized cooperation (…)" (Liakopoulos, 2020b)[1].
Institutionalized cooperation was conceived in a residual way. Why does this happen? Because there are no coercive mechanisms that force states to coordinate within an international organization. The cooperative obligation itself is not binding under customary international law, representing a progressive development. According to the commentary on the draft articles we read:"(…) it may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law (…). Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all states are called upon to make an appropriate response to the serious breaches referred to in article 40 (...)"[2].

[1]Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on second reading in 2001, p. 114, par. 2.

[2]Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on second reading in 2001, p. 114, par. 3.

What are the obligations of a negative nature?

After the positive nature included in par. 1 of Art. 41 DARSIWA par. 2 of the same article raises some questionable questions. First of all, there is the obligation not to recognize the illicit situation resulting from violation of the former art. 40, which seems to abstentionally limit official recognition. The obligation to respect is one of the problems that concerns all these acts that do not constitute a formal approval of the situation that is created in violation of mandatory rules such as acceptance a fait accompli. Already in this situation the International Court of Justice (ICJ) in "Legal Consequences for States of the Continued Presence of South Africa in Namibia" (South West Africa) case of 1971 recognized the following: "(...) the obligation of non-recognition includes a substantial profile in addition to the formal one. Therefore, this obligation excludes not only the formal admission of the legitimacy of the illicit situation but also the performance of all acts that could "imply a recognition" (...)" (Dugard, 1972)[3]. The problem is the identification of the obligations that imply the prohibition of non-recognition of a situation that is carried out in

[3]ICJ, South-West Africa, Ethiopia v. South Africa and Liberia v. South Africa, of 21 December 1962, ICJ, Reports, 1962, par. 121.

serious violation of an imperative norm (Talmon, 2006). In the same spirit of thought is the dissenting opinion of judge Kooijmans to the advisory opinion of the International Court of Justice on the Wall in Palestine case affirming that: "(…) in understanding what the duty not to recognize an illegal fact involves" concluding that "the duty not to recognize amounts, therefore, (…) to an obligation without real substance" (Liakopoulos, 2020a)[4].

In theory art. 41 no longer produces clarifications and information relating to the content of the obligation as can also be seen in the West Africa case where the ICJ attempted: "(...) to identify some consequences deriving from the obligation of non-recognition. According to the opinion, states must refrain from entering into and implementing cooperation agreements with the offending state that concern illegally acquired territories, send diplomatic missions, consular agents or special missions that can recognize the authority of the offending state over such territories and maintain economic relations, or any other form of cooperation, relating to situations arising from the illicit acquisition (…)" (Liakopoulos, 2020a)[5]. The obligation of non-recognition as legal is a fact, rectius a situation of a violation of the ius cogens in the

[4]Separate opinion of judge Kooijmans, in ICJ, Reports 2004, p. 232, par. 44.

[5]ICJ, South-West Africa, Ethiopia v. South Africa and Liberia v. South Africa, of 21 December 1962, op. cit., par. 79.

sense of not recognizing any legal effect thereof (Talmon, 2006) simultaneously presents itself as a limit to this obligation represented by the requirement not to burden the reaction against individuals and victims of serious violations[6].

Non-recognition as an obligation must be distinguished from assistance in maintaining the situation of creating a serious violation of mandatory rules as regulated by Art. 41, par. 2 DARSIWA. This prohibition allows the states involved not to offer technical, economic and financial assistance to maintain the illicit situation. Already in the commentary on the project of the articles the ILC specified as its object the behaviors contributing to an ex post facto situation which preserve the situation produced by the offence. The prohibition on assistance in maintaining the illicit situation according to Crawford has a broad scope as compared to other obligations[7]. The ILC already affirms that: "(...) the "aid or assistance" formulation of art. 41, par. 2, must be kept distinct from that referred to in Art. 16 of the Project, concerning the hypothesis of complicity in the commission of the violation, as the first concerns any active or passive conduct that contributes to maintaining the situation. Art. 16 of the Project also requires that

[6]ICJ, South-West Africa, Ethiopia v. South Africa and Liberia v. South Africa, of 21 December 1962, op. cit., par. 124.

[7]ICJ, South-West Africa, Ethiopia v. South Africa and Liberia v. South Africa, of 21 December 1962, op. cit., par. 125.

the state has "knowledge of the circumstances of the internationally wrongful act", a prerequisite which is completely absent in the formulation of art. 41 (…)"[8].

Furthermore, Art. 41, par. 3 DARSIWA observes the consequences that are foreseen by international law and which concern serious violations of mandatory rules. In our opinion, this provision apparently formulates the central provision of the codification project regarding the reaction to serious violations of collective obligations. Par. 3 of art. 41 seeks to soften the previous paragraphs by trying to allow an integration to the regime of offenses taking into account the specificity of the violated obligation. The purpose is flexible and dual in nature. On the one hand, the rule does not affect serious violations of mandatory rules and the consequences provided for all violations according to Chapters I and II of part II of the project. On the other hand, the provision thus formulated allows the application of offenses deriving from international law also in the near future[9].

---

[8]Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on second reading in 2001, pp. 115-116, par. 13-14.

[9]Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on second reading in 2001, pp. 115-116, par. 13-14.

(Follows): The possibility of adopting countermeasures

We already know from practice and doctrinal theory up to the present day that the connection between international responsibility for serious violations and mandatory norms has not been complete. Only Art. 54 DARSIWA represents some general lines of thought as can already be seen from its title: "Measures taken by states other than an injured state", as adopted by the latest Project on the responsibility of states of 2001, which reads as follows: "Measures taken by states other than an injured state", and adopted by the latest "State Responsibility Project" of 2001, which affirms that: "This chapter (…) does not prejudice the right of any state, entitled under article 48, paragraph 1, to invoke the responsibility of another state, to take lawful measures against that state to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached (...)"[10].

The problem is concentrated on lawful measures, in relation to the institution of retaliation, as measures that are per se lawful. Thus the necessity is not understood because an article regarding the

[10]ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on second reading in 2001, art. 54.

possibility of adopting lawful measures in light of international law such as retaliation has not been designed or inserted. On the other hand, the article dedicated to countermeasures leaves a wide margin of interpretation regarding the countermeasures which consider the qualification of the measures as lawful, i.e. as a reference to the countermeasures that are adopted within the limits and conditions of the project, considering them lawful to the international law and as a case of exclusion of the offence.

Legitimation and reaction against the violation of erga omnes obligations

The violation of erga omnes obligations and the unilateral reaction of the states to this type of violation seems like a legitimate action of the reaction of the states by the one materially harmed. Already from the distant past the defense of collective interests are present in Huig de Groot, according to whom "(…) kings have right to demand punishment not only on account of injuries committed against themselves or their subjects but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person (…)" (De Groot, 1625). The need for a reaction to international wrongdoing comes out of the theme that already existed a few centuries ago. The

topic is linked to serious violations of international law as also occurred in the ILC. The violation of erga omnes obligations and all states of the international community are entitled to an optional right to adopt countermeasures to guarantee compliance with these rules.

(Follows): The legal interest

The legal interest presents itself as: "(...) the relation of being concerned or affected in respect of advantage or detriment". This is a vague expression and needs further specification. From a subjective point of view we are faced with an interpretative block that dates back to the dissenting opinion of judge Morelli in the South West Africa case of the IJC where: "(...) seems to be discarded as it would excessively broaden the scope of the term interest (…)" (Liakopoulos, 2020a)[11]. From an objective point of view, the use of "being concerned" presented the same drawback as a rule that can: "(...) give rise to a multitude of interests of various nature[12], for example economic, political, humanitarian,

[11]According to Morelli "(…) each state is the judge of its own interest", Dissenting opinion of judge Morelli in case: South-West Africa, Ethiopia v. South Africa and Liberia v. South Africa, of 21 December 1962.

[12]According to the dissenting opinion of judge Koretsky in case: South-West Africa, Ethiopia v. South Africa and Liberia v. South Africa, of 21 December

etc. (…) There can be no doubt that since there are so many individuals and states, there exist an enormous variety of interests in national community and within the international community. Yet this does not mean that each and every interest is protected by law. Indeed, it seems to be a function of law to separate interests worthy of protection from those which are not to benefit from such protection (…)" (De Hoogh, 1996).

In the topic under examination we also already have other jurisprudence as we see for example in the arbitration dispute between France and Spain on the Lac Lanoux case which concerns the management of waters that were in French territory but which flowed through a river to Spain, where the Court arbitrator observed that: "(…) il faut d'abord déterminer quels sont les intérêts qui doivent être saufegardés (…)" cependant, diffèrentes considérations déjà dégagées par le Tribunal conduisent à une interprétation plus large. Il faut tenir compte, quelle qu'en soit la nature, de tous les intérêts qui risquent d'être affectés par les travaux enterpris, même s'ils ne correspondent pas à un droit (…) (Liakopoulos, 2020b)[13]". This proposed position in relation to the provisions of the treaty shows the distinction between legal interests protected by rules and simple interests of

1962.

[13]Judgment of the Franco-Spanish Arbitration Tribunal of November 16, 1957, Lac Lanoux case, France v. Spain.

various kinds which appears to be affirmed. The ICJ affirms that: "(...) humanitarian considerations could not be considered sufficient, in themselves, to give rise to rights and obligations on states. To achieve this result, the principles and moral values that states have an interest in defending must in any case be consolidated into a legal norm otherwise they would remain classifiable as simple interests without a legal character (...)"[14]. This ruling would have produced: "(...) the Court's position seems to want to affirm a principle that can be shared in general terms, namely that simple interests without a legislative basis cannot be asserted in a judicial context and cannot enjoy legal protection

[14]As stated in the judgment of the International Court of Justice of 18 July 1966, case South West Africa, Ethiopia and Liberia v. South Africa, para. 49-51: "throughout this case, it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as they are given a sufficient expression in legal form (…). Humanitarian considerations may constitute the inspirational basis for rule of law, just as, for instance, the preambular part of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out (…) do not in themselves amount to rules of law. All states are interested-have an interest-in such matters. But the existence of an "interest" does not on itself entail that this interest is specifically juridical in character (...)"

(...)"[15].

Furthermore, in the Barcelona Traction case the ICJ stated that: "(...) the distinction between mere interests and legal interests makes a connection between this argument and the regime of responsibility of the states (…). The legal position of the shareholders of Belgian nationality of the Barcelona Traction company would not have been suitable to found an intervention in diplomatic protection by Belgium since these subjects were holders of mere interests and not real rights (…) not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected (…)" (Liakopoulos, 2020b)[16]. In this case the ICJ took a position regarding responsibility which concerns only the violation of a right and not of a mere interest, i.e. the possibility for the injured state to enforce the responsibility of the state as the author of the offense which takes place in the moment in which the conduct of that state is detrimental to a legal interest that has been protected

[15]Judgment of the International Court of Justice of 18 July 1966, case South West Africa, Ethiopia and Liberia v. South Africa, par. 38.

[16]Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 5 February 1970, in ICJ Reports, 1970, p. 3ss., parr. 39ss.

by a law.

Returning to the Lac Lanoux case, Gervais clearly notes the distinction between simple interests, legitimate interests and real rights that can arise from legal interests. According to the ruling, the difference between legitimate interests and legal interests consists in the fact that: "(…) les intérêts légitimes seront des intérêts qui feront l'objet d'une certaine protection sociale, mais moindre que celle accordée aux droits stricts ou nommés. Alors que ceux-ci doivent être totalement satisfaits, (…) les intérêts légitimes devront seulement être pris en consideration avec un souci réel de les concilier avec les intérêts adverses. (…) Le 'droit' du titulaire d'intérêts légitimes, correspondant à l'obligation de leur accorder cette protection restreinte, n'est pas un droit comme les autres puisqu'il correspond à la protection d'intérêts non spécifiés (et non d'un intérêt nommé) et à une protection réduite (au lieu d'intégrale) (…)" (gervais, 1960).

The legitimate interests that are applied to international law have been used in an attempt to legally establish the right of states as different from the one materially harmed and as a reaction against the violation of erga omnes obligations. States would enjoy a power of action towards international bodies using a "contentieux de la légalité" (Bollecker-Stern, 1973). The notion of legitimate interest which is analyzed in domestic law is also taken into

consideration and thus the normative category which cannot be applied to the international legal system is understood given the absence of fundamental elements of the configurability of the institution. The state-subject as addressee in international law cannot find itself in a condition of subordination of the subjects of the international order as addressee since it would be found in a condition of mere subordination before the subjects of the international order and towards a superordinate body. It is possible to arrive at the statement that only legal interests can protect a legal norm since they are relevant to the in-depth analysis and analysis of international responsibility since other types of interests are not qualifiable and cannot find application in the international legal system (De Hoogh, 1996)[17]. In the same spirit we recall Rudolf Von Jhering's position regarding the legally protected interest which corresponds to the traditional definition of subjective right and includes the faculty of reaction in defense of this right (Von Jhering, 1865). A legal interest is protected by a rule and the recipient of this legal rule is the owner of a right that requires respect and protection.

[17]According to the De Hoogh: “The protection of interests has, generally speaking, taken place by means of the elaboration of primary rules of international law”, in A. de Hoogh, Obligations Erga Omnes, op. cit., p. 17.

Damage and legal prejudice

The responsibility of an authorizing state in the face of an international wrong takes the form of some type of damage. The commission of an offense is divided into three types of damage: material and moral damage and legal prejudice of an abstract, general form. In the first two cases of material and/or moral damage, the suitability of the offense gives rise to the responsibility of the state. Instead, regarding the abstraction of legal prejudice as foreseen by Tsuroaka in his own ILC work we can see that: “(...) pour que l’on puisse parler de responsabilité de l’Etat, il faut qu’il y ait un intérêt lésé d’un sujet du droit international et que cet intérêt soit lésé à cause d’un acte accompli par un autre sujet du droit international. Le problème de l’intérêt juridique lésé se pose avant tout sur le plan bilatéral entre les Etats auteur et victime de dommages. Ces dommages sont d’ordinaire d’ordre matériel. Mais dans certaines hypothèses, des dommages d’ordre non matériel peuvent aussi entraîner la responsabilité de l’Etat. La responsabilité de l’Etat se trouve ainsi engagée lorsque l’Etat porte atteinte à l’honneur d’un autre Etat. En revanche, il me semble difficile de parler de la naissance de la responsabilité de l’Etat en se basant simplement sur une inobservation du droit international général qui n’occasionne pas de dommage réel

(...)"[18].

The sole violation of the law that does not include concrete damages is sufficient to enforce the responsibility of states in different positions that are expressed over time (Anzilotti, 1906). Already according to Annzilotti: "(…) dans des cas assez nombreux le dommage se confond avec la violation même du droit" (Anzilotti, 1906), it is understood that reparation for the offense is identified in an establishment of the violated legal order. According to Salvioli: "(...) the violation of a rule of international law gives rise to the duty of reparation on the part of the state guilty of the violation towards the state damaged by the illicit act, regardless of whether or not damage has occurred (…) (Salvioli, 1929) and "(…) le droit à la réparation naît au moment ou l'acte illicite a été commis (…)" (Salvioli, 1929). There are obviously also other lines of thought where damage has been considered as a condition of the existence of a wrong and in our opinion as a condition of the obligation to be repaired. According to our opinion in the topic under analysis we can say that when a state commits an offense and we are faced with the absence of concrete material and/or moral damage, such behavior in the sector of international responsibility is not binding for the obligation of be a repaired state because there simply isn't even anything to repair.

[18]Yearbook of the International Law Commission, 1963, Vol. II, Part I, p. 260.

However, as regards legal prejudice and moral damage, in this case we are not talking about compensation but about effects that coincide. An obligation to repair in the absence of material damage would not consist of pecuniary or material obligations but rather of the re-establishment of the violated legal order through the annulment of the legal act in violation of the law and the declaration of its illicit nature. According to Bollecker-Stern: "(...) the lack of distinction between the two notions would be explained through the assimilation that states operate between the concepts of sovereignty and the respect of their rights (...) any violation of their rights would also entail a moral prejudice as an act detrimental to the sphere of sovereignty "(…) l'Etat possède un intérêt juridique à voir le droit international respecté à son égard; la moindre atteinte à cet intérêt constitue un préjudice juridique qui en l'état actuel du droit est assimilé au préjudice moral en ce qui concerne ses conséquences sur le plan de la réparation (…)" (Bollecker-Stern, 1973).

More clearly, within the ILC, Crawford attempted to differentiate between damage and prejudice, noting that: "(…) as to the basic distinction between "injury" and "damage", it is clear that injury involves the concept of iniuria-that is, infringement of rights or legally protected interests-whereas the term "damage" is used to refer to actual harm suffered (…)" (Crawford, 2013). A first

solution dates back to the “Draft Articles on State Responsibility” of 2001 where the path of: “recognition of the existence of state responsibility regardless of the damage caused (...)” was followed and as Crawford explains: “(...) the question whether damage is a prerequisite for a breach becomes a matter to be determined by the relevant primary rule (…) the rules of international law cover the most disparate subjects and it is often difficult to identify real direct and concrete damages caused by their violation, as happens for example in the case of norms on human rights, or on environmental protection, or on disarmament (…). This happens for all those norms that impose standards of behavior on the part of states (…). The damage represents a requirement to found the responsibility of the state author of the violation. This would then weaken the effectiveness of these rules with the consequence of making international relations more insecure (…). A state aware of the difficulty for the victim state to prove the damage could act in a more unscrupulous manner in the hope that its responsibility may not be proven by the state that suffered the damage (...)”[19].

[19]According to Crawford: “If damage where to be made a distinct prerequisite for state responsibility, the onus would be on the injured state to prove that damage, yet in respect of many obligations this may be difficult to do. A state could proceed to act inconsistently with its commitment, in the hope or expectation that damage might not arise or might not be able to be proved. This would tend to undermine and render insecure international obligations

The solution accepted in Articles 1 and 2 of the 2001 Project affirmed the omission of any reference to damage and at the same time attempted to identify the essential elements of an offense in case of a violation and of an international obligation to attribute the conduct to a state up to the responsibility of states for any internationally illicit act.

In this case the prerequisite of damage as a reaction in self-protection applies in the case of violations of erga omnes obligations. The different methods of reaction between the state and the states have suffered material damage and the states involved have also suffered a legal prejudice which is based on the illicit erga omnes. According to Bollecker-Stern: "(…) the states legitimated to assert responsibility should consider themselves injured, with the difference that a state injured in its subjective right would have a legal interest in that this right is not violated, while the other states they would have the sole interest in respecting objective law (…)" (Bollecker-Stern, 2001).

Position which is based on the existence and validity of a dispute regarding the legality of international law and is not easily configured in the international legal system. The role of the state damaged by an illicit erga omnes in relation to the way of reaction of the states involved which have suffered a legal prejudice, it is

(…)".

not actually a concrete case of damaged states. We start from the recognition that all states have suffered legal prejudice. The injured state must be recognized as having the right/power to manage its own particular inherent nature of the offence. The coordination of the injured state affirms the prevalence of the interests most affected by the violation. The injured state is not able to react and the other states would be allowed to react autonomously and effectively with the duty to cooperate as per Art. 41 of the project of the articles.

There is no clear distinction between the injured parties. Already since the project of 2001 no solutions have been offered in this regard and it seems to renounce the position followed at the time of the recognition that the states of the international community of the harmfulness of erga omnes offenses is often doubtful or difficult to be approved.

Obligation and right in international law. Crossing or distancing points?

The rights in which a state is the holder must be accompanied by the obligation to respect the other subjects of the legal system. Any subject has the right to prevent the exercise of these rights without incurring international liability. The obligations that

prescribe conduct whether of an omissive or commissive nature, the law consists in the states the obligation to require implementation. According to Ago: "(…) it should be noted that in international law the idea of breach of an obligation can be regarded as the exact equivalent of the idea of infringement of the subjective rights of others (…). The correlation between legal obligation on the one hand and subjective right on the other admits of no exception (...)"[20].

The lack of a subject legitimated to invoke the responsibility of another subject where his own conduct is lawful, the same subject thus appears to be devoid of effectiveness. The subject who participated in the creation of the legal situation derives correlative obligations and rights that must have the right to react autonomously and in legal situations where they were part without their consent. According to Virally: "(…) l'obligation ne devient juridique (…) que si elle se rencontre avec un droit. Une obligation dont nul ne peut réclamer l'exécution ou sanctionner la violation n'est qu'un impératif de la conscience (…) however, states are not holders of the right to react to the general violation of the international legal order but must be holders of a specific legal interest, i.e. recipients of the rights and obligations deriving

[20]Second Report on State Responsibility, R. Ago Special Rapporteur, in Yearbook of the International Law Commission, 1970, Vol. II, Part I, p. 192-193.

from the legal situation they themselves created (...)" (Virally, 1960).

The violation of the international order allows the existence of an obligation of a general nature with respect to the legal order before all states (Bollecker-Stern, 1960).

A concrete legal interest reacts in a necessary way in the international legal system since on the one hand it determines a chaotic situation in international relations and makes the multiplication of controversies possible. On the other hand, the evolution of international law is observed through the consensus of the states and does not, for example, recognize a legal interest in a state for a rule that it respects and which has not given its consent of a binding nature. According to de Hoogh: "(…) where a state is not bound to a rule, it cannot be considered to have an interest in breaches of obligations under that rule. (...) If a state is bound to the observance of an obligation there one or more states will necessarily be holders of the corresponding right to react to its violation (…)" (De Hoogh, 1996). According to Tunkin: "(…) by denying a generalized right of states to react to all violations of international law, it affirms the right of all states to react against the violation of a restricted core of norms, failure to comply with which would constitute a danger for peace (…) la rupture ou menace de rupture de la paix touche de nos jours non seulement

les intérêts, mais les droits de tous les Etats (…)" (Tunkin, 1965). In the same spirit of thought we remember the position of Bollecker-Stern: "(…) l'intérêt que portent tous les Etats au respect du droit ne semble pas avoir subi une transformation coutumière en intérêt juridique qu'en ce qui concerne quelques rares normes de la plus haute importance faisant sans doute de jus cogens (…) (Bollecker-Stern, 2001) to respect some fundamental norms towards all the states of the international community undoubtedly recalls the concept of jus cogens which many authors have assimilated to the concept of international public order (...)" (Orakhelashvili, 2006). In our opinion, the expression that concerns the "constitutional" can be abandoned because it risks giving greater attention to the thesis on the "contentieux de légalité" (Bollecker-Stern, 2001), which thus recognizes states' right to act legally before to the violation of international law, thus avoiding legal uncertainty and political tension between states. In this way, the norms of jus cogens are taken into consideration which focus on the attention of the holders and recipients of the norms, i.e. the faculty of the recognized reaction that the states have not directly suffered real damage. If all states are recipients of erga omnes obligations, the correlative subjective legal positions react to their violation which consists in a legal prejudice for all states and their right to assert the responsibility of

the state that committed the related offence.

To identify a subject or various subjects towards a state that is the holder of an obligation is required to respect bilateral or multilateral relations that are regulated by treaty. According to De Hoogh: "(…) by postulating the principle of obligations with correlative rights to demand performance of such obligations, one must assume therefore that the complementary rules laying down such rights are conceived, at least theoretically, to cover all breaches of obligations that could occur in practice. Thus, it is to be presumed that the law leaves no lacunae in this regard, and provides for the exercise of a right to demand performance of obligations in each and every possible case of breaches thereof (…) even erga omnes obligations should necessarily present a correlative structure between obligations and rights like the one described above, but the question that arises is who are the holders of the correlative right (...)"(De Hoogh, 1996).

According to Riphagen: "(...) the identification of the state holder of the right to react to the violation of the norm cannot ignore the content and form of the primary norm[21] (…) these being characterized by the fact of having to be observed in relation to all the states of the international community, the correlative right to

[21]Sixth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook of the International Law Commission, 1985, Vol. II, Part I, p. 3-19.

react to their violation should therefore belong to all states (…). A state can assert the international responsibility of another state only if it holds a legal interest. This legal interest arises in the hands of the state only when it is the owner of the legal situation that is considered violated (...) as there are no legal categories other than right and obligation in the international legal system, in the legal relationship between two or more parties, the holders of the obligations will automatically be entitled to the corresponding right to react against the violation of the foreseen obligation (...) of the erga omnes obligations, all states are required to respect these rules which require respect for values considered fundamental and inalienable (...)"[22].

According to Barile: "(…) Il n'y a pas lieu de penser que (…) dans l'ordre international l'on puisse envisager des obligations structurées objectivement, c'est-à-dire des obligations auxquelles ne correspondrait pas un droit subjectif d'autrui, mais dont l'observance serait confiée, dans l'intérêt général de la collectivité, à une institution (Barile, 1978) (…) that this collective interest "se pulvérise toujours dans les droits de sujets particuliers qui peuvent en assurer la défence (…) it follows that all states are at the same time holders of obligations to protect

[22]Sixth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook of the International Law Commission, 1985, Vol. II, Part I, p. 3-19.

collective interests, but also of the right to react to their violation (…)" (Orakhelashvili, 2006)[23]. In other words, "(…) a legal interest in possession of a state has been considered to stand for a right of protection, that is, a right to demand the performance of (breached) obligations. Thus, if a breach of an obligation erga omnes entails for every state a legal interest in its protection, that ipso iure means that they are in possession of a corresponding correlative right of protection (…)" (De Hoogh, 1996).

In our opinion, the observations reported above present themselves as an aid to the right of reaction on the part of all states which are individually considered when faced with a violation of the obligations of erga omnes. Here it must be underlined that the necessary corollary evaluation of international responsibility presents itself as a body that seeks to adopt only countermeasures. Because the implementation of responsibility presents itself as a right to cessation and as reparation of the

[23]According to Orakhelashvili: "(…) the link to community interest as distinct from individual interests of states should be a key factor in determining a norm's peremptory character" (…) nonetheless, the violation of mandatory rules aimed at safeguarding collective interests represents an injury to the juridical interests of individual states as subjects to whom compliance with these rules is due. From this derives the possibility of a decentralized reaction in defense of collective values, but in the exercise of individual rights (…)".

wrongdoing and as a true coercive moment which represents the relative measures for the reparation of a wrongdoing as a coercive act which represents the adoption of measures of pressure on the perpetrator state of an offense and respects the obligations incumbent upon it. The possibility of resorting to countermeasures as well as the reaction of the injured state or states would be reduced to the relevant requests before the state that committed the crime. There is no reason to stop the offense and to repair any damage. The adoption of countermeasures cannot be separated from international liability law since they are functional drivers for the application of the relevant obligations of the liability regime. It is thus stated that the right to self-defense as a reaction is a necessary right and that it corresponds to an international obligation that could not be effective and does not resort to countermeasures.

States not materially harmed and adoption of countermeasures

When we talk about countermeasures and states not materially harmed, we think of the work of the ILC which dates back to 1963 in this sector, as among the first speakers Roberto Ago proposed to distinguish based on the Barcelona Traction of the ICJ ruling,

the different types of illicit according to the seriousness of the violation committed and the difference between misdemeanors and crimes. In the opinion of the rapporteur in question: "(...) such a differentiation would have been meaningless if corresponding differentiated liability regimes[24] had not been envisaged (...) for the so-called international crimes, i.e. the most serious violations of international law (...) on the possibility of states reacting unilaterally or only as members of an international organization, which would be competent in choosing the methods of reaction (…). The role of the Security Council was proposed as central in the reaction to international crimes, as a representative body of the international community as a whole (…)"[25].

It was already useless at the time to entrust a political body such as the Security Council (SC) of the UN with a hegemonic, decisive role in relation to responsibility for international crimes, given the voting problem within the SC[26]. The possibility for individual states to adopt countermeasures did not play a central

[24]Fifth Report on state responsibility, R. Ago Special Rapporteur, in Yearbook of the International Law Commission, 1976, Vol. II, Part I, p. 26, par. 79.

[25]Fifth Report on state responsibility, R. Ago Special Rapporteur, in Yearbook of the International Law Commission, 1976, Vol. II, Part I, p. 26, par. 79.

[26]UN Docs. A/C.6/31/SR.21, par. 8 (Japan); A/C.6/31/SR.26, par. 5 (France); A/C.6/31/SR.27, par. 20 (Australia), A/C.6/31/SR.23, par. 11-12 (Greece).

role at the time (Dawidowicz, 2017)[27]. The subsequent Special Rapporteur, Willem Riphagen, based on the model of enforcement of international norms which is: "(...) essentially bilateral-minded"[28]. In modern international law norms had progressively established themselves to protect the collective values and interests of the international community which would made a reaction necessary on the part of all states, not just those concretely harmed (...)"[29]. In 1984, article 5 was introduced into the Project which concerned the notion of injured state and in the

[27]According to Dawidowicz: "(…) few states in the Sixth Committee at this stage explicitly addressed the issue of possible third-party countermeasures in response to state crimes. Finland and Japan stressed the risk of abuse by powerful states and expressed their opposition to third-party countermeasures. In contrast, the Federal Republic of Germany stated that in response to a state crime third states, although not immediately involved, might well being entitled to take countermeasures. Indonesia stated in seemingly unequivocal terms that in the case of a state crime an injured state can take reprisals, and the other states can do the same (...)"

[28]Third Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook on International Law Commission, 1982, Vol. II, Part I, p. 36, par. 91.

[29]Fourth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook on International Law Commission, 1983, Vol. II, Part I, p. 21-22, par. 115.

case of an international crime the qualification of injured states[30], was recognised, such as: “on the assumption that to each and every obligation corresponds per definitionem a right of at least one other state (…)” (Liakopoulos, 2020b)[31]. Riphagen: “(...) did not allow the possibility for all injured states, pursuant to art. 5, to resort to countermeasures on a unilateral basis, but considered it necessary for an independent and authoritative establishment of the facts and the applicable law (...) which would be the responsibility of the United Nations bodies operating on the basis of the procedures of the Charter relating to the maintenance of peace (…). The implementation of responsibility in the case of international crimes could only be achieved “within the framework of the organized community of states”[32] because “a single state cannot take upon itself the role of “policeman” of the

[30]Sixth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook on International Law Commission, 1985, Vol. II, Part I, commentary to article 5.

[31]Draft article commentary to art. 40 par. 2. Robert Ago in Second Report on State Responsibility, 1970, Vol. II, p. 192, par. 46, affirms that: “it seems perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others (...)”.

[32]Sixth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook on International Law Commission, 1985, Vol. II, Part I, p. 14, par. 10.

international community[33] (…) were envisaged in order to guarantee "a minimum of required solidarity", and were limited to three cases (…). Article 14 provided for the obligation of all states to cooperate in the cessation of the illicit act, the obligation not to assist the state that committed the crime and the obligation not to recognize the legal situations arising from the crime (…)"[34]. It is understood that the principle that has to do with an international crime and that involves all the states that are considered as injured are included in Art. 40 DARSIWA and at the time no ad hoc position was taken regarding the specific consequences of the offense and in particular regarding the possibility for the injured states to resort to countermeasures.

For the Special Rapporteur, Gaetano Arangio-Ruiz: "(…) the main problem in the discipline of responsibility for the commission of international crimes concerned the determination of the existence of any such wrongful act and its attribution to one or more states[35]

[33]Sixth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook on International Law Commission, 1985, Vol. II, Part I, p. 14, par. 6.

[34]Sixth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook on International Law Commission, 1985, Vol. II, Part I, p. 14, par. 7.

[35]Fifth Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commission, 1993, Vol. II, Part II, p.

(…). This project was considered “too broad to be realistic and as revolutionary and unattached to states (...)”[36]. (...) In the Draft Articles of 1996, the normal regime of countermeasures ended up being applied, as regulated from articles 47-50, also to international crimes (…). To the role of UN institutions, it was considered that it was not necessary to introduce new procedures regarding the resolution of disputes, and, on the other hand, it would not even be possible to do so at light of Art. 103 of the UN Charter (…)”[37].

By carefully reading Articles 40 and 47 of the Draft Articles of 1996 it is understood that the commission recognized an individual right of states that are not harmed and have no recourse to adopting countermeasures in the case of violations of erga omnes obligations (Liakopoulos, 2020b). In Dawidowicz's opinion: “(…) it should be stressed, however, that this provisional conclusion resulted more from the poor drafting of Draft Article 40 [1996] (which have completely failed to distinguish between

48, par. 211.

[36]Fifth Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commission, 1993, Vol. II, Part II, p. 48, par. 211.

[37]Fifth Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commission, 1993, Vol. II, Part II, p. 48, par. 212.

directly and indirectly injured states) than any explicit approval of a regime of individual third-party countermeasure (…)" (Dawidowicz, 2017). According to our opinion the related rights remain as objects of further investigation. As rights attributed to the states themselves and with an absolute right, compensation for damage as equalization of the position of third states and the injured state. The project of the ILC does not offer a solution regarding the analysis and development of different liability regimes as they vary according to the type of crime committed (Jørgensen, 2000).

According to James Crawford, since 1997 the concept of international crimes as well as the identification of subjects entitled to react against the most serious violations of international law, as well as the related forms of reaction and the possibility for states not directly affected to resort to countermeasures were some of the topics that needed to be discussed. The ILC abandoned the category of international crimes stating that: "(…) the systematic development in the draft articles of key notions such as obligations erga omnes, peremptory norms (jus cogens) and a possible category of the most serious breaches of international obligations could be sufficient to resolve the issues raised by article 19 (1996) (...)"[38].

[38]ILC Report, 1998, UN Doc. A/53/10, p. 77, par. 331.

The line of use of the concept of erga omnes obligations was adopted according to the identification of the subjects entitled to react to violations according to Art. 48, par. 1, letter. b) of the project of 2001. Until then, these offenses were classified as international crimes and the concept of serious violations of obligations deriving from mandatory norms according to general international law was used, i.e. art. 40 of the project of 2001. Crawford believed that: "(...) the project approved at first reading was based on a fundamental paradox: affirming, in fact, the exact correspondence between rights and obligations in the international legal system, any relationship of responsibility was brought back to a classic bilateral structure (...) even multilateral type of responsibility relations, among which violations of erga omnes obligations assumed particular importance, were reduced to a bundle of bilateral relations.

Art. 40 of the 1996 Project, therefore precluded the possibility of distinguishing the positions of the materially damaged states, which were part of a bilateral logic, from those of the states which had not suffered any damage but which nevertheless appeared to have suffered a legal prejudice[39] (...) then proposed a distinction between "injured states" and "states having a legal interest",

[39]Third Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commision, 1991, Vol. II, Part I, p. 32-33, par. 97-98.

specifying that the former would have the right to request the cessation of the offense and to resort to all forms of reparation making use, where necessary, of the countermeasures, while the latter could only have requested cessation and restitution but could not have resorted to either other forms of reparation or countermeasures (…). This distinction, however, was not considered satisfactory since all the injured states are also holders of a legal interest (Tams, 2011)[40], therefore, the previous categories were replaced with the concepts of "injured states" and "states other than injured states" (…). States other than the injured one were recognized the possibility of resorting to all forms of reparation, not just restitution, provided they are requested in the interest of the injured state or of the beneficiaries of the violated rules (…)"[41].

We see a path of distinction between the positions of different subjects that imply violations of erga omnes obligations. The project of 2001 remains as an unfinished and very fragile project. We note the weakness of Crawford's proposal which analyzed and explained the positions of the aggrieved states and states other than the aggrieved ones. Thus we can talk about legal positions of a subjective nature with their own rights and the related legal

[40]Yearbook of the International Law Commission, 2000, vol. 1, p. 394, par. 50.

[41]Yearbook of the International Law Commission, 2000, vol. 1.

legitimation that allows one to react in self-protection.

The issue of the countermeasure in relation to the violation of erga omnes obligations remains in Crawford's thought where for various states, from the one injured, it is possible to resort to countermeasures considered as "wholly untenable"[42]. The rapporteur identified the cases in which countermeasures by states not actually affected would be considered legitimate. We note the first case where the injured state in practice shows how third states have adopted countermeasures upon request and on their own behalf, thus reproducing a practice similar to collective self-defense. A second case is in the case of absence of an injured state which occurs due to violations of human rights and as practice has shown in the case in which third states have resorted to countermeasures in the case in which violations of erga omnes obligations are revealed as: "(…) gross, well attested, systematic and continuing"[43].

Well, actually the interpreted thought of the second special rapporteur was included in Article 54 entitled: "Countermeasures by states other than the injured state", which is affirmed that: "1.

[42]Summary records of the meetings of the fifty-second session, in Yearbook of the International Law Commission, 2000, Vol. I, p. 302, par. 2.

[43]Third Report on State Responsibility, J. Crawford Special Rapporteur, in Yearbook of the International Law Commission, 2000, Vol. II, Part I, p. 106, par. 405.

Any state entitled under article 49, paragraph 1 [art. 48.1], to invoke the responsibility of a state may take countermeasures at the request and on behalf of any state injured by the breach, to the extent that that state may itself take countermeasures under this chapter. 2. In the cases referred to in article 41 [art. 40], any state may take countermeasures, in accordance with the present chapter in the interest of the beneficiaries of the obligations breached. 3. When more than one state takes countermeasures, the states concerned shall cooperate in order to ensure that the conditions laid down by this chapter (artt. 49-53) for the taking of countermeasures are fulfilled (...)"[44].

On the one hand we see the concern to protect the erga omnes obligations and the related rights involved as well as the possibility of resorting to countermeasures, the serious violations of international law as lacking protection given that the SC has given ineffective proof to the political conflicts in own internal[45]. According to Simma: "(…) the possibility of resorting to countermeasures would have represented a valid alternative to the use of force in the most serious international crises[46], therefore:

[44]ILC Report, 2000, UN Doc. A/55/10, p. 70.

[45]ILC Report, 2001, UN Doc. A/56/10.

[46]ILC Report, 2000, UN Doc. A/55/10, p. 305, par. 33: "(…) the Commission must not forget that it was devising a regime of non-forcible countermeasures which would help avoid situations where states claimed that they had

"legitimizing economic sanctions might have the effect of reducing the risk of a spillover into military sanctions (...)[47]. Practice has shown how states other than the injured state have not abused the possibility of resorting to economic sanctions (...) modest violations of erga omnes obligations are considered by the states to be part of their reserved domain, and for this would avoid intervening, so as not to in turn risk intervention by other states in matters falling within domestic jurisdiction. Opponents of the possibility for states other than the injured state to resort to countermeasures argued, on the contrary, that the provision was dangerous, as it would have had a negative impact on the UN collective security system, which instead had to be referred to as more serious violations, given the guarantees of objectivity and universality that the procedures established by the UN Charter are able to offer. Furthermore, they argued that the indeterminacy of the concepts of jus cogens and erga omnes obligations would have represented a pretext for the use of countermeasures by strong

---

exhausted all peaceful means and adopted the attitude which had been taken by the United Kingdom in the context of the collective measures adopted against Yugoslavia in 1998. If the Commission defines a feasible regime of pacific collective countermeasures, states would be less likely to adopt another course, such as the regrettable one taken in Kosovo (…)".

[47]ILC Report, 2001, UN Doc. A/56/10, p. 35, par. 4.

states of the Community against weaker states (...)"[48].

According to the projects proposed by the General Assembly of the UN (Dawidowicz, 2017), the special rapporteur also proposed the safeguard clause which allowed opinions relating to the topic to be taken into consideration. Lawful measures were used instead of countermeasures given that the objective is to respect all positions as can also be read in Art. 54 of the Draft Articles: "(…) the article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by states other than the injured state in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole (...)"[49].

In finis, we can say that the project has left questionable spaces in relation to the progressive development of international law and therefore art. 41 was inserted as well as the expression: "further consequences" as possible reactions concerning violations of obligations that have to do with mandatory rules of international law. A suitable position/solution was not offered for the fundamental questions concerning the legal title that legitimizes the injured states to react as well as the possibility for the states to

[48] ILC Report, 2001, UN Doc. A/56/10.

[49]Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as adopted on second reading in 2001, p. 139, par. 7.

adopt real countermeasures. According to Dawidowicz: “(…) the ILC was ultimately “caught between a rock and a hard place” which resulted in the adoption of the saving clause in Article 54 ARSIWA, a compromise solution motivated by the kind of pragmatism that so often characterizes the international law-making process (…)” (Dawidowicz, 2017).

Towards the institutionalization of an international order

The ascertainment of an institutionalization of the crime on a global level requires the decision to react. Reaction to rules aimed at protecting collective interests, the opportunity and necessity of identifying bodies that represent the members of the international community, thus overcoming bilateralism at a regulatory and at an institutional-organizational level.

The risk remains of the exaggerated proliferation of unilateral interventions by states in the name of defending collective interests which entails a serious destabilization of interstate relations (Simma, 1989). Thus, the international community: “(...) therefore found itself faced with “a serious normative dilemma (…) and the risk of states making an improper use of counter-measures cannot be discarded, but the alternative may well be that common interests of international society are not protected by law.

Were states not even allowed to adopt counter-measures that are otherwise lawful, one would probably have to conclude that law rather protects the infringement of those interests (…)" (Dawidowicz, 2017).

The need for greater institutionalization and hierarchization of the international system is based on the theory of "dédoublement fonctionnel" proposed by Scelle according to which: "(...) the individuals-organs of the states would play a dual role, that of state organs in the case of find themselves operating within the national legal system, and that of international agents when they act within the international legal system (…)" (Scelle, 1948). It is a theory that affirmed and recognized the inorganic structure of the international community, and within this context the author highlighted: "(...) the limits of his own theoretical construction by observing that: le droit (...) est un substitut dangereux de l'organisation institutionnelle qui manque dans l'ordre juridique international. Or, il représente une solution temporaine, compte tenu des tendences actuelles concernant les relations inter-ètatiques (…)" (Scelle, 1948). Scelle put on the table the development of a hierarchical institution that is organized by the model of state regulations. Instead his theory was commented by A. Cassese as: "(…) progress, in Scelle's view, can be made in the international community only if one moves towards restraining

the authority of rulers and succeeds in establishing a set of international social agencies or bodies capable of bringing the international legal order into line with the basic configuration of state systems (…)" (Cassese, 1990). The comment is respected only that it excludes the topic of erga omnes obligations and does not reflect the ideal of justice and peace represented in a system of state organization.

The institutionalization of the international legal system has developed around the theme of the verification and reaction of the violation of rules that protect fundamental values towards the international community considering its whole. According to Dupuy: "(…) the emphasis placed on the collective interest of the Community considered as a whole should have led to the identification of an entity capable of representing this collective interest in order to guide and control the reaction of the various states. This need for institutionalized representation immediately placed the UN in a privileged position, since the UN forum appeared to be the only organization in which the participation of (almost) all the states of the world was ensured, as well as (...) the choice of the most suitable UN body to represent the international community "as a whole" (…)" (Dupuy, 2006).

In reality Dupuy proposed a collaboration between the General Assembly where all the states could express their condemnation

and the violation of mandatory norms and a second collaborative component would be the SC, which will have the function of deciding and guiding the reaction on the one hand against the perpetrator state and on the other hand to prevent violence. We can characterize it as a clearly theoretical model but lacking in effectiveness in practice. The effectiveness of this type of proposal is based on the possibility for the permanent members of the SC to resort to the right to veto, which obviously materializes in the immunity that these members react to other states and to serious violations of international law. The sanctioning of an institutionalization project by the international community and through UN channels remains utopian and highly questionable.

Tavernier also deserves to be remembered who affirmed and recognized the decentralized and inorganic nature of the international community by affirming in a less formalist and more realist way the role of international organizations with a universal vocation that do not behave as legislators of the international community (Tavernier, 2006)[50]. Its version is that of the

[50]According to Tavernier: "(…) toutefois, celui-ci ne saurait se limiter à une analyse purement formaliste, ne tenant pas compte de certaines réalités qui se développent. Ainsi, ne peut-on pas considérer que les organes pléniers des Organisations internationales, comme l'Assemblée générale des Nations Unies, ou les organes correspondants dans certaines Institutions spécialisées, ou éventuellement dans d'autres organisations à vocation universelle,

institutionalization of the international order, where according to its own "version démocratique" it remains stable: "(...) to the function of ascertaining and identifying the mandatory norms which could be the responsibility of the UN General Assembly in within which all states are represented (...) the "authoritarian version" would be based on the central role of the Security Council which would operate as the executive body of the international community, according to an unscrupulously extensive interpretation of the powers recognized to this body by the Charter of UN on peacekeeping (…)" (Tavernier, 2006). Like Dupuy, Tavernier also remains faithful to his predecessor and to a utopian and unacceptable path because it inevitably results in the denial of the principle of equality between states. Perhaps the authors remain on this path because they could not produce other more effective paths and given the difficulties encountered in an international legal system, the development of norms considered binding is not established: "(…) en effet, les enjeux associés à l'identification de règles fondamentales sont fort divers et variables. Ils sont d'ordre juridique avec un souci de hiérarchisation des normes par opposition à l'absence de toute

peuvent, à certains égards et dans une certaine mesure, exercer des fonctions d'ordre législatif et se comporter comme des législateurs ou de 'quasi-législateurs' dans la société internationale de transition que nous connaissons (…)".

hiérarchie dans le droit international classique. Cela peut conduire à une sorte de 'constitutionnalisation' du droit international, avec tous les problems que cela est susceptible d'entraîner, notamment lorsque plusieurs règles fondamentales entrent en concurrence. Un autre enjeu tient au souci d'introduire des 'valeurs' dans un droit traditionnellement peu soucieux de celles-ci (…)" (Tavernier, 2006).

According to our opinion, to rely on the path of international organizations as well as on bodies that have a high percentage of a political and less juridical character, it remains difficult to materialize the erga omnes obligations, as well as the materiality of management of the interests and values of the international community given that we know a priori that a priority role in the control and management of the actions of the UN is the right of veto. Therefore, the suitability, even the political desire that no one judges as also in the sector of interventions for the protection of peace, the re-establishment and promotion of the protection of human rights are collective interests of the international community understood as a prevailing state force and as a function of organization in a reactive way especially in the sector of the prohibition of aggression, the concept of threat to peace, the management functions which remain responsible for a unilateral exercise of some states, especially the strongest ones where this

functioning in practice remains weak and often blocked. The proposal for a solution that recognizes the role of the SC in the implementation of erga omnes obligations and its reactions to their violation appears aware of the impossibility of excluding the admissibility of unilateral interventions by states due to the limits of competence of an organization that remains at risk of paralysis perhaps even of the activity itself (Simma, 1993).

We are talking about a complex, ambiguous, obscure system of reaction to violations of erga omnes obligations which materialize in a competing path of unilateral action by some states that are part of the UN system. The affirmation of collective values and principles is achieved without the international community equipping itself with supranational institutions and bodies where their protection cannot be entrusted to member states of the international community and holders of their own collective interests. The implementation of erga omnes obligations cannot be considered to be the exclusive competence of the bodies of the UN but involves a varied range of reactions according to concrete circumstances that favor the organized or unilateral reaction. In this case it is understood that the lack of an institutional structure that imposes on a general level and towards the states the path of ascertaining the wrong erga omnes expresses the concern that the unilateral reactions of the states can be truly oriented towards

satisfaction and protection of collective interests. These are purely selfish behaviors and goals. The establishment of a model of legitimacy control on the action of states has hardly worked up to the present day and it could be delegated that the SC in light of the functioning and composition of the body does not respect the requirements and legal certainty, impartiality which is necessary for the control and legitimacy of the acts and actions of sovereign bodies. The concerns are continuous and above all for the centralization of the relative functions which concern the offense and the decision on sanctioning measures of a political body such as the SC which enjoys privileged positions compared to other members of the international community.

Work of the ILC and responsibilities of states

The greatest danger for the ILC is the implementation of collective values and principles that can be used in an instrumental manner by states for the pursuit of particular goals, making the need for regulation of certain situations urgent. The 2001 work was the basis for various theoretical developments that followed in the coming years. It was the work of understanding the reasons why the first paths were opened as well as the reasons for failure and the analysis of theoretical constructions within the

progressive development of international law. In the period of Roberto Ago the topic of illicit and erga omnes was approached in a superficial way. And it was normal given that the maturity for this topic was far away given that the articles had not yet been clearly established on the offences, on the responsibility of states, etc. certainly the priority work was to form the characters and reactions to the crimes which were limited to the analysis above all of the concepts considered to be of a preliminary nature[51].

In the Fifth Report Ago already tried to anticipate the serious consequences that derive from the acceptance of the category of international crimes by arguing that: "(…) it is to be expected that

[51]Fifth Report on State Responsibility, R. Ago Special Rapporteur, in Yearbook of the International Law Commission, 1976, Vol. II, Part I, p. 52: "(…) it may be useful to recall the limits of our task at this precise point in the overall work of codifying state responsibility. We are now required to decide whether there is justification for drawing a distinction between different categories of internationally wrongful acts according to the content of the obligation breached by a state. We must determine whether, from this specific standpoint, certain wrongful acts are to be described as more serious than others and hence, whether they should be characterized differently. On the other hand, the time has not yet come to specify which regime of responsibility should be applicable to the various types of internationally wrongful acts distinguished. We shall have to take a position on the latter question when we deal with the problem of the content and forms of responsibility (...)".

many governments, if they accept the distinction between two different categories of internationally wrongful acts, will again do so subject to the condition that the finding of the existence of an "international crime" should be made, in a specific case, by an international instance, whether that instance be the Security Council or the International Court of Justice (...)"[52]. Following, Roberto Ago underlined: "(...) in relation to the violation of erga omnes obligations, the recognition of the power to react to such violations held by all states of the international community would undoubtedly have entailed the risk of an anarchic drift of the international order (...) considered plausible "that a community such as the international community, in seeking a more structured organization, even if only an incipient "institutionalization", should have turned in another direction, namely towards a system vesting in international institutions other than states the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented (...)"[53].

[52]Fifth Report on State Responsibility, R. Ago Special Rapporteur, in Yearbook of the International Law Commission, 1976, Vol. II, Part I, p. 53.

[53]Fifth Report on State Responsibility, R. Ago Special Rapporteur, in Yearbook of the International Law Commission, 1976, Vol. II, Part I, p. 53.

According to our opinion Roberto Ago followed a solution which in practice would be to recognize the bodies of the UN with their own role at a time when the UN Charter itself faithfully proposed the solution of authorization to direct the action of states other than the one materially injured as well as sanctions against the state responsible for serious violations of international law. Those were the years when the UN Security Council (as well as the UN Charter) was the main body for the resolution of disputes and as a regulator of every international crisis. But the years have shown that times have changed and this path was only in an embryonic stage and certainly not a soluble path.

The special rapporteur Riphagen, following the path of his own persecutor, stated that: "(...) since the international crimes consisted of violations of erga omnes obligations, all the states of the international community had to consider themselves injured. However, in relation to the methods of reaction, the Special Rapporteur made a distinction between the position of the directly injured state or states, which would be entitled to all the legal situations deriving from the offence, and that of the states not directly injured, whose reaction powers would have been limited (…). The latter could have reacted by adopting countermeasures, but only following a decision representing the will of the international community "as a whole", which had recognized the

existence of an international crime and the methods of reaction, as each individual state cannot therefore act as a "gendarme" of the international community (...)"[54]. Riphagen identified: "(...) the United Nations is a privileged forum, especially as regards the violation of the prohibition on aggression (...)[55] to other types of crimes, whether their commission integrates the hypotheses of Art. 39 of the UN Charter, whether it did not integrate them, the application of the Charter procedures regarding the maintenance of peace was envisaged, the use of the procedures of the collective security system would have completely absorbed the possibility of states to react with unilateral measures (…). The regime of the consequences of crimes thus configured ended up excluding any possibility of decentralized reaction outside the procedures established by the UN Charter (...)"[56].

[54]Third Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook of the International Law Commission, 1982, Vol. II, Part I, par. 140.

[55]Fifth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook of the International Law Commission, 1984, Vol. II, Part I, p. 1, p. 4.

[56]See articles 4 and 14 of the Fifth Report on State Responsibility, W. Riphagen Special Rapporteur, in Yearbook of the International Law Commission, 1984, Vol. II, Part I, p. 3-4.

Even these positions are full of weaknesses and imperfections despite the fact that they refer to Chapter VII of the UN and to a poorly articulated elaboration, necessary to make the proposal acceptable from the point of view of a progressive development of international law. The recognized role of the SC was not consistent with the need to develop an objective and impartial scheme for regulating the unilateral reactions of states. The weakness of the project was the overcoming of the SC element as a political body that protects its own sovereign interests, but also clearly national protection positions. The impossibility of reserving the main role for this body is devoid of objectivity and the right of veto and non-procedural nature of a liability regime concerns the protection of collective interests of a universal nature, distancing the references and violations of the rules of international law as a basic action of the organization. The system of collective security and the maintenance of global peace is automatically applicable to state responsibility.

So it is clear that both Ago and Riphagen were the harbingers of some interesting elements of discussion but far from the practice and the future of international organization in the sector of international responsibility. Because the international community differs radically from the domination of equal relations between subjects and could not be considered as the expression of an

international community organized from a perspective of hierarchy of interstate relations[57]. Because the state bodies and the organization's competences do not represent a sort of government of an international nature but only a forum for the action of the states considered individually. The path of the UN can always be considered and used in the context of the development of a liability regime in an automatic way and interpreted in the regimes of reaction to serious violations of international law. The need for institutionalization of the regime concerning international crimes should have the aim of avoiding risks from arbitrators of all kinds[58].

The adoption by qualified majority of the SC and the General Assembly of resolutions that are contrary to the political role played by these two bodies will also be far: "(…) from the allegation (...) to justify the grave concern of the international community (...)"[59].

[57]Seventh Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commission, 1995, Vol. II, Part I, p. 26 par. 70.

[58]Seventh Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commission, 1995, Vol. II, Part I, pp. 5, 26-27, 32.

[59]Seventh Report on State Responsibility, G. Arangio-Ruiz Special Rapporteur, in Yearbook of the International Law Commission, 1995, Vol. II,

The problem is the possibility of not resorting to the right of veto for the permanent members who are involved in the dispute, to the adoption of resolutions which subsequently avoid having to resort to the ICJ. Discourse is not the function and verification of the wrongdoing that respects political bodies such as the Security Council and the General Assembly. The issue is the need to prevent concertation and control procedures, as well as to avoid countermeasures and exclude the competence of individual states as holders of the violated rights, highlighting the verification of the offense, contributing to the normative development of international law, institutionalizing the regime of reaction to crimes, take note of the discussions and points that the ILC needs to resolve. If the ILC abandons itself and does not find a solution regarding the institutionalization of reactions against the most serious violations of international law, it will not be able to carry out any work in the foreseeable future. The choice not to develop a more effective article, i.e. Art. 40 of the project of 2001 which states: “article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious

---

Part I, pp. 5, 26-27, 32.

breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations", will result in the lack of codification of international law in the sector of international responsibility (Liakopoulos, 2020).

The lack of active institutional schemes with a view to the progressive development of law and above all in the affirmation of the inorganic structure of the international community allows us to speak of non-recognition of a current state of law which does not ensure the application of erga omnes obligations. The verification of new statements and modalities that have to do with the modalities and reactions of the most serious violations of international law are contrary to the realization of the fear regarding the path of unilateralism in the reactions and the protection of the fundamental interests of the international community.

Concluding remarks

As we have seen so far, the legal title that legitimizes states that are not materially harmed to organize themselves and react in self-

defense against the state that committed the offense is based on the difference between legal prejudice and damage as well as on the existing correlation between obligations and rights in the international law. The violation of rules and obligations of erga omnes are holders of a right of a correlative nature based on the power to assert the international responsibility of the state which is the author of the offense and to adopt countermeasures as an essential tool for the application of the obligations deriving according to the rules of international responsibility.

The matter remains that despite the work of the ILC, the customary rule that recognizes the faculty/right of states not materially harmed to adopt countermeasures according to a serious violation of erga omnes norms is concentrated on the identification of a norm legitimizing the adoption of countermeasures by states not materially affected. The expression of lawful measures used by ILC in Art. 54 DARSIWA (Liakopoulos, 2020b) is very ambiguous given that it tries to reconcile the positions of the states based on an objective evaluation of the practice and on the opinio juris ac necessitatis. It is taken into account that the rule of lawful measures does not refer to simple retaliations, which are excluded from the primary rules which thus gives the right to states not directly injured to resort to countermeasures to use this expression. In our opinion

this is a reference to general international law and the legality or otherwise of the countermeasures as part of states not materially harmed. The use of lawful refers to those measures that are supported by practice and opinion that can be qualified as lawful countermeasures. The results obtained can be affirmed in the possibility for states that are not adopted by countermeasures by stating that the existence of resorting to countermeasures and the violation of a mandatory norm that is considered desirable as a primary norm and object of violation and not just as a reaction. The ILC has tried over the years to build a list of binding rules by crystallizing a formal and essential nucleus of rules against the violation of these rules. The final objective is for these standards to have an affirmation and use in the international community. Of course, collective interest implies that there are values and objectives that transcend the mere individual interest of the single state as a modifying force that leads to overcoming the bilateral structure of interstate relations. The rules protecting this collective interest are those concern all states. According to the collective nature, for some they are the result of: “(…) the common concern does not pertain exclusively to states but refers to mankind (…)” (Vidmar, 2014). The international community as a whole contains a quid pluris that respects the traditional concept of international community as an additional element that develops international

law towards a direction of guarantees and against the abuse of sovereignty that impacts on common values in humanity. A possible transformation of international law is prevalent in the domain of state sovereignty in a system placed at the service of international community and in the broad notion of human community. A community transformed into the structure of the international order which as Vidmar affirms: "(…) although reflecting a strong sense of international community and its values (…) the enforcement of the community interest still, for a great part, runs through state-centric procedures and within a state-centric international structure (…)" (Vidmar, 2014).

The functioning mechanisms and the evolution of the collective character of international law are advanced elements that favor the institutionalization of the international community as a meeting and collaboration point against violations of binding rules. The lack of realism in international relations does not pave the way for a functioning mechanism of the international community but continues to protect the collective interests of humanity through a long historical, legal process transformed by the international community itself. Today it cannot be said that states can create new forms of protection of collective interests through agreements. The current system in state practice does not leave ample space for the creation of the existence of a global apparatus

that ignores state sovereignty to enjoy the political legitimacy necessary for the exercise of coercive powers towards individuals. The states materially harmed or not have followed a path of common values towards an entire humanity which can make it even better towards a universal community of individuals who leave open the continuous competition between them of a political, economic, military and cultural nature. A competition that is surrounded within a common system where selfish behaviors do not calculate benefits and costs within general constraints shared between them. The path to avoiding global chaos in a world where the single state or actor is not able to avoid it alone allows us to say that the path of trust towards the self-regulation of the system is actually verifiable and does not appear free of critical issues for the next few years.

References

Anzilotti, D. (1906). La responsabilité internationale des États à raison des dommages soufferts par des étrangers. *Revue Générale de Droit International Public,* 13.

Barile, G. (1978). *La structure de l'ordre juridique international. Règles générales et règles conventionnelles.* Collected Courses of The Hague Academy of International Law, ed. Brill, Bruxelles, vol. 161, III, 44ss.

Bollecker-Stern, B. (1973). *Le préjudice dans la théorie de la responsabilité internationale.* Editions A. Pedone, Paris, 33.

Bollecker-Stern, B. (2001). Et si on utilisait le concept de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des Etats. *Annuaire Français du Droit International, 47*, 24.

Cassese, A. (1990). Remarks on Scelle's theory of "role splitting" (dédoublement fonctionnel) in international law. *European Journal of International Law, 1, (1),* 1990, 218ss.

Crawford, J. (2013). *State responsibility: The general part.* Cambridge University Press, Cambridge, 54-55.

Dawidowicz, M. (2017). *Third-party countermeasures in international law*. Cambridge University Press, Cambridge, 77.

De Groot, H. (1625). *De iure belli ac pacis.* H. Lavrentii.

De Hoogh A. (1996). *Obligations erga omnes and international crimes: A theoretical inquiry into the implementation and enforcement of the international responsibility of states.* Kluwer Law International, The Hague, 12.
Dugard, J. (1972). Namibia (South West Africa): The Court's opinion, South Africa's response, and prospects for the future. *Columbia Journal of Transnational Law*, 11, 14ss.
Dupuy, P. (2006). *Droit international public.* Dalloz, Paris, 126.
Gervais, A. (1960). L'affaire du Lac Lanoux, étude critique de la sentence du Tribunal arbitral. *Annuaire Français du Droit International,* 6 (1), 423-424.
Jørgensen, N.H.B. (2000). *The responsibility of states for international crimes.* Oxford University Press, Oxford, New York.
Liakopoulos, D. (2020a). *The role of not party in the trial before the International Court of Justice.* ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020b). *Complicity of states in the international illicit*. ed. Maklu, Antwerp, Portland.
Nollkaemper, A., D'Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N., Plakokefalos, I., Jacobs, D. (2020). Guiding principles on shared responsibility in international law. *European Journal of International Law, 31 (1),* pp. 20ss.
Orakhelashvili, A. (2006). *Peremptory norms in international law.* Oxford University Press, Oxford.

Salvioli, G. (1929). *La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux*. Recueil des Cours de l'Académie de Droit International de La Haye, ed. Brill, Bruxelles, vol. 28, III, 1929, 235.
Scelle, G. (1948). *Manuel de droit international public.* Domat-Montchrestien, Paris, 22.
Simma, B. (1989). Bilateralism and community interest in the law of state responsibility. In Y. Dinstein (ed.). *International law at a time of perplexity: Essays in honour of Shabtai Rosenne.* Martinus Nijhoff Publishers, Dordrecht, 827ss.
Simma, B. (1993). Does the UN Charter provide an adequate legal basis for individual or collective responses of obligations erga omnes?. In J. Delbrück (ed.), *The future of international law enforcement. New scenarios-new law?,* Duncker & Humblot, Berlin, 125ss.
Talmon, S. (2006). The duty not to recognise as lawful a situation created by illegal use of force or other serious breaches of a jus cogens obligation: An obligation without real substance?. In C. Tomuschat, J.M. Thouvenin (eds.), *The fundamental rules of the international legal order: Ius cogens and obligations erga omnes.* Martinus Nijhoff Publishers, Leiden, Boston.
Tams, C. (2011). Individual states as guardian of community interest. In U. Fastenrath et al. (eds.). *From bilateralism to*

community interest. Essays in Honour of Bruno Simma. Oxford University Press, Oxford.
Tavernier, P. (2006). L'idéntification des règles fondamentales, un problème résolu?. In C. Tomushat, J. M. Thounevin (ed.), *The fundamental rules of the international legal order: ius cogens and obligations erga omnes,* Martinus Nijhoff Publishers, Leiden, Boston, 6ss.
Tunkin, G.I. (1965). *Droit international public, Problèmes théoriques.* Editions A. Pedone, Paris, 223ss.
Vidmar, J. (2014). Protecting the community interest in a state centric legal system: The UN Charter and certain norms of "special standing". In W. Benedek, K. De Feyter, M.C. Kettemann, C. Voigt (eds.). *The common interest in international law.* Intersentia, Cambridge, The Hague, 128ss.
Virally, M. (1960). *La pensée juridique.* LGDJ, Paris.
Von Jhering, R. (1865). *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entiwicklung.* Breitkopf und Härtel, Leipzig.

Are there customary rules in the area of unilateral sanctions?

DOI:10.5281/zenodo.10572464

Otto Garr, Ph.D in international law, Germany, post Ph.D in international affairs and international law, US

Introduction

Before a war of any kind, the issue of sanctions against the state that does not obey and violates norms of international law has always and endlessly remained a topic of discussion as well as an important evaluator in the life of international relations.

The unilateral tendency of sanctions is a strong discomfort towards multilateralism as well as as regards its effectiveness and dates back in the UN history (Alvarez, 2000; Reisman, 2000)[60].

[60]According to Alvarez: "(…) some multilateral responses, fully sanctioned by the law, may not be wise, may cause untoward suffering for large numbers

There are many concerns and for some they are challenges of international relations between states as well as the evolution of international law (Thouvenin, 2000; Daudet, 2020)[61]. Multilateralism based on institutionalism as a type of cooperation, is a legal technique for the conclusion of international agreements, a decision-making procedure between states seeking solutions to resolve disputes and between subjects of public international law (Simma, 1994)[62]. Multilateralism presents itself as a "vehicle par

of human beings, or may serve to undermine the rule of law itself (…) on the other hand, some unilateral responses, as most recently the United States' and its allies' actions in Kosovo, may be needed, even if illegal (…). More generally, the failure to enforce norms of international law, especially those of such import as the prohibition on genocide, is the multilateralists' Achilles heel (…). Multilateral enforcement of international norms has not emerged, even by the unrepresentative, unaccountable Security Council (…). Unilateral implementation or enforcement measures have often been used to enforce international norms, the most recent being NATO's bombing of Kosovo (...)".

[61]According to Daudet: "(…) le multilatéralisme se confond avec le droit international lui-même. Plus exactement, le multilatéralisme est le principal vecteur de développement du droit international (...)".

[62]According to Simma: "(…) multilateral treaties serve as the vehicle par excellence of community interest (...)". ICJ, Reparation for injuries suffered in the service of the United Nations, consultive opinion of 11 April 1949, in ICJ Reports 1949, p. 174 and 178: "(…) in history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has

excellence of community interests (...)" (Trachtman, 2016)[63]. Within this context of multilateralism, states and international organizations operate with coercive powers at a centralized level where multilateralism is based on fundamental objectives that evolve through the rule of law, respect for the obligations of the

already given rise to instances of action upon the international plane by certain entities which are not states. This development culminated in the establishment in june 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations (...)". Abdulqawi Ahmed Yusuf affirms that: "(…) the "requirements of international life" (…) and "the increase in the collective activities of states" which the Court spoke of reveal the inadequacy of unilateral or bilateral actions to address the challenges facing our increasingly interconnected world. They also dictate the necessity of multilateral co-operation in a diverse and complex range of areas of common concern to humanity (…)". Speech of H.E. Mr. Abdulqawi Ahmed Yusuf, President of the International Court of Justice, before the Security Council, 9 November 2018.

[63]According to Trachtman: "(…) government is the name we give to the things we choose to do together through formal rules and organizations, even in the international arena (…). By referring to government instead of governance, I wish to focus on formal rules and organizations: on law (…) the existing structures of international law and organization comprise a kind of rudimentary government. It has a set of rules that is limited in volume compared to an advanced domestic system. Its legislative system is largely dependent on unanimity, it has little capacity for mandatory adjudication, and

international community (Koskenniemi, 1995-1996)[64], a necessary and available approach to the creation of a network of sanctions against totalitarian regimes where unilateral sanctions do not escape an objective appreciation for international law[65].

The use of national security intrinsically allows the notion of state to be linked to the definition of its internal constituent elements (Ferguson, Mansbach, 2018; Talmon, 2019; Daudet, 2020)[66].

---

it has little executive or enforcement capacity (...)".

[64]According to Koskenniemi: "(…) in the absence of trust (a fact that defines the condition of international "anarchy"), it seems both rational and responsible to place immediate self-interest before an uncertain and fragile common interest (...)".

[65]According to Koskenniemi: "(…) an appreciation (...) is significant to the identity of political communities called "states". Again, an answer to that question depends on whether we see a state's identity in territorial, economic, institutional, ideological, gendered, religious, or constitutional terms (...)".

[66]According to the speech of Donald Trump in General Assembly of the United Nations: United Nations, General Assembly, Seventy-third session, 6th plenary meeting, UN Doc. A/73/PV.6, 25 September 2018, par. 17, "(…) America's sovereignty to an unelected, unaccountable, global bureaucracy. America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism (...)". According to Daudet: "(…) les retraits unilatèraux pratiquès actuellement principalement par les Etats-Unis ètant de mauvais coups portès au droit international, ils blessent la sociètè internationale et expriment une vision nationale souverainiste de celui-là qui en est en fait la nègation. C'est donc une vision dangereuse car elle fait

States are the only interpreters and acquirers of various actions (Krauthammer, 1991)[67]. International legislation has given way to unilateral sanctions and to a constant work but without great results of the International Law Commission (ILC) giving rise to agreements in force (Pauwelyn, Wessel, Wouters, 2019)[68]. Multilateralism has now taken root and favored the legal

resurgir la force comme principe de gestion du monde se substituant aux principes de coopèration et de solidaritè, lentement dèveloppès au fil des cent dernières annèes (…)".

[67]According to Krauthammer: "(…) there is much pious talk about a new multilateral world and the promise of the United Nations as guarantor of a new post-Cold War order. But this is to mistake cause and effect, the United States and the United Nations. The United Nations is guarantor of nothing (…). There is a sharp distinction to be drawn between real and apparent multilateralism. (…) What we have today is pseudo- multilateralism, i.e. a dominant great power acts essentially alone, but, embarrassed at the idea and still worshiping at the shrine of collective security, recruits a ship here, a brigade there, and blessings all around to give its unilateral actions a multilateral sheen (…)".

[68]These are: (i) Draft Articles on the Protection of Persons in the Event of Disaster, A/71/10, in Yearbook of the International Law Commission, 2016, vol. II, Part Two; (ii) of the Draft Conclusions on the identification of customary law, cf. infra, note 680; (iii) of the Conclusions on subsequent settlements and subsequent practice, A/73/10, in Yearbook of the International Law Commission, 2018, vol. II, Part Two; and (iv), of the Draft Articles on the Prevention and Punishment of Crimes against Humanity,

technique and decision-making procedure for regulating contemporary international relations. We are talking about the transition "from formal to informal international lawmaking (…)" (Alvarez, 2020)[69]. This is a radical transitional passage in the history of international law towards a conception that is structurally different from the regulatory function, arriving at the

A/74/10, in Yearbook of the International Law Commission, 2019, vol. II, Part Two. According to Pauwelyn, Wessel, Wouters: "(…) the actors (central state authorities), processes (formal lawmaking in IOs), and outputs (rigid treaties or IO decisions) recognized in traditional international law are not adapted. In this sense, the traditional structures have become shackles. This goes well beyond the phenomenon of soft law as it addresses not only informal output but also new and informal actors and processes (…). Multilateral treaties now exist on most major policy issues. Where the area is covered by existing conventions, new treaty-making appears to be very difficult (…). States have become increasingly reluctant in the face of what they consider an "invasion" of their domestic legal systems by international norms which, in some cases, take precedence over national legislation and even deeply held constitutional values (…) from societies of individuals (at the national level) and a society of territorial states (at the international level) to an increasingly transnational and diverse society of networks (…). Thereby multiplying the types of actors and processes involved in cross-border cooperation (…) [and] because they cannot legally conclude a treaty or join an IO-are pushing international lawmaking from the formal to the informal arena (…) complexity and the resulting uncertainty and rapid change (…) more flexible norms or guidelines, grounded in practical

statements of the G-20 or the International Council for Harmonization of Technical Requirements for Pharmaceuticals for Human Use (ICH) (Shaffer, Pollack, 2010; Pauwelyn, Wessel, Wouters, 2012; Pauwelyn, 2012; Ruiter, Wessel, 2012), as: "(…) whether an instrument is legally binding under international law is simply no longer the right criterion or proxy (…)" (Weil, 1983; Dupuy, 2020)[70]. Thus unilateral sanctions present themselves as acts of soft law, as measures that show a crisis of multilateralism and where their concept is evaluated as affirmed caution: "(…) as an art at the international level because we do not construct the issues in terms of international constitutional authority, because the territorial limits to the exercise of sovereign autonomy remain in a state of flux, and because the standards set by international law remain incomplete in many areas and ambiguous and open-

experience and expertise and continuously corrected to take account of new developments and learning (…)".

[69]According to Alvarez: "(…) soft or informal law aw can no longer be described, if it ever plausibly could, as the product of academics and fuzzy headed ICJ judges (...)".

[70]According to Weil: "(…) a rule of a treaty or customary law may be vague, "soft"; but (...) it does not thereby cease to be a legal norm. In contrast, however definite the substance of a non-normative provision (...) that will not turn it into a legal norm. Yet the fact remain that the proliferation of "soft" norms, of what some also call "hortatory" law, does not help strengthen the international normative system (...)".

textured in many others (…)" (Sands, 2000).
The source of these legal effects caused by unilateral sanctions can be the result of customary or treaty law (remember the denunciation of the treaty) and in any case of legally valid acts (Crawford, 2012; Saganek, 2015; Pellet, Müller, 2019). Unilateralism is now a political force with legal consequences given that the adoption of acts that intend to impose one's will on the life of international relations are interested and internationally valid where the substantial validity and legitimacy of the objectives they pursue are topics of discussion and analysis (Dupuy, 2000; Nollkaemper, 2011).
One might think that between unilateralism and multilateralism the adoption and practice of sanctions appears artificial. The real reasons that push states to unilaterally follow sanctions as a demonstration of great powers led to the adoption of a series of guiding principles where the General Assembly took into consideration the Resolution n. 61/34 of 4 December 2016. Principles that do not distinguish the various types of unilateral and identified acts but concern unilateral acts stricto sensu, that is: "(…) those taking the form of formal declarations formulated by a state with the intent to produce obligations under international law (…)" (Damrosch, 1997). We thus speak of unilateralism on a quantitative and qualitative level. Obviously there are many

unilateral behaviors and the shared approaches are recognized in the sector of the quality of relations between states (Daudet, 2020), leading to a crisis in a technical sense of the multilateral system and to the stipulation of numerous agreements creating inter se legal regimes to coordinate and avoid potentially overlapping frictions (Pauwelyn, 2008; Weiler, 2012, Trachtman, 2013; Senti, 2014; Petersmann, 2016; Goldsmith, Togawa Mercer, 2018). As regards the qualitative approach, the collaboration between states that operate outside a specific institutional framework is discussed from a normative point of view, criticizing the ineffectiveness, or rather the inability of the main, institutional actions to understand the normative plans, especially that of international responsibility and illicit acts. The market of the WTO, the inaction, the inertia of the Security Council of the United Nations contribute to determining the crisis of institutionalized multilateralism by predisposing reactions that incline in the direction of a unilateralism that tries to recover a face of defense among unilateral actions and promotion of collective interests. Sanctions in the technical sense and the pursuit of certain fundamental objectives for the international community make the use of unilateral sanctions lawful. This is a statement but also a question that is based on the practice of the significant and possible limits of a contractual nature that

international law places on the use of the unilateral sanctioning instrument by evaluating the lawfulness of this instrument and requesting the reconstruction of customary norms in this matters that allow and/or prohibit states from applying unilateral measures.

What are the constituent elements of an international custom?

The discussion on international custom is very broad and endless. Here we are interested in the work of the ILC which concluded on the "identification of customary international law", in 2018 where a project of 16 conclusions was adopted by the UN General Assembly which was submitted to the attention of the states and of all those who may be called upon to identify the rules of customary international law (especially international judges)[71]. The theory that customary law is no longer necessary for the life of the community of states is under question and seems unrealistic

[71]Draft Conclusion on the identification of customary international law, Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65), in Yearbook of the International Law Commission, 2018, vol. II, Part Two. General Assembly of the UN, A/RES/73/203, of 20 December 2018, par. 4.

(Kelly, 2008)[72]. Of course, the path of the normative value of custom is also another doctrinal position (Goldsmith, Posner, 1999; Vagts, 2004; Murphy, 2012). Within this context, another school is also taken into consideration where custom is not necessary to be part of the sources of international law (Kelly, 2000; Bianchi, 2017; Pigrau Solè, 2018)[73], given that states must concentrate on negotiation of international agreements and treaty law presents itself as the most effective regulatory source that reflects the continuous stresses of today's reality (D'Amato, 1998; Choi, Gulati, 2016; Van Den Herik, 2016). These are theoretical positions that move from the belief that they have spread from the Anglo-American system where customary and treaty law presents a strong and complex relationship that ends in terms of substituting one for the other (Dinstein, 2006).

The obsolescence of customary law is a different phenomenon that represents the process of writing its own norms, i.e. the custom generalis scripta which thus reflects a phenomenon and written norms based on international agreements and on even written norms of general international law where their autonomy,

[72]According to Kelly: "(…) much of CIL is a fiction (…) is not necessary in an era of rapid communications. If there is, in fact, the political will to accept international legal norms, then a binding treaty is possible (...)".

[73]"(…) CIL should be eliminated as a source of international legal norms and replaced by consensual processes (...)".

existence and applicability are deprived. According to the statements of the Special Rapporteur of the UN regarding the identification of customary law, the definition of the relationships between sources can be configured as a relationship of jus generalis (custom) and jus speciali (treaties) operating: “(...) on an equal level of interdependence and mutual support (...)” (Baxter, 1970). The treaties are subjected to a special regime of customary norms which thus regulates their formation, their effects and the extinction of the power to bring the related exceptions. The custom takes place in various sectors of the international law (Sender, Wood, 2017) and plays a flexible and informal role, and above all a fundamental role (Lim, 2016) where unilateral sanctions are not regulated by international conventions (Pellet, 2016).

The uncertainties for the constituent elements of an international custom affect the construction of the norm, the terms of its own conception which are common to every unwritten normative source and to the behaviors of its associates (Kolb, 2003; D'Aspremont, 2015; Gradoni, 2019), thus crystallizing facts where customary law includes within a scope of application, i.e. the rules of the international legal system which determine the criteria for the construction of a customary norm, the rules, rectius the values founded for the life of international relations by directing the

actions of states and other entities with legal personality (Schachter, 1982; Meron, 1989; Koskenniemi, 1990; Tomuschat, 1994; Tesòn, 1998a; Tesòn, 1998b; Tasioulas, 2007; Petersen, 2007; Ryngaert, Wouters, 2009; Lepard, 2010; D'Aspremont, 2016)[74].

Perhaps customary law "[is] situated in a minefield" (Koskenniemi, 1990) in an "identity crisis" (Simma, Alston, 1989) where the emergence of conceptions of a heterodox nature fuel various divergent theories that are in conflict with each other and which do not always end in disunity (Verdross, 1969; Kammerhofer, 2017), as unwritten norms (Scoville, 2016; Aledo, 2021) entailing risks of transformation from purely implicit consensuses that resemble convincing natural law[75] to an evolution of international law which concerns constitutive

[74]ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), sentence of 5 October 2016, par. 215. According to Bianchi the ICJ created a strong feeling that "nuclear disarmament should be reserved to the political arena and not addressed by the Court for judicial determination", contributing to the "progressive disempowerment of international law (...)".

[75]Draft Conclusions on identification of customary international law 2018, Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65), in Yearbook of the International Law Commission, 2018, vol. II, Part Two.

elements of a custom shared in an absolutely prevalent and exclusive manner through international jurisprudence (Mettraux, 2005; Jarvis, 2017; Arajärvi, 2017; Van Der Wilt, 2019; Tan, 2021)[76] which is more similar to the concluding works of the conclusions on the identification of customary law (Trapp, Mills, 2012; Love, 2014; Klinzing, 2014; Law, 2018; Bhatt, 2018; Snoxell, 2018; Liakopoulos, 2020a)[77]. The competent body to take

[76]ICTY, Prosecutor v. Kupreškić, Trial Chamber, Judgment, 8 January, 1999; and from the special tribunal of Lebanon: Appeals Chamber, Decision on Appeals of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, par. 47.

[77]ICJ, Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), Judgment, 3 March 2012; for a summary of the discussion, see International Law Commission, Report on the work of Its Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), UN Doc. A/71/10 (2016), at 316ss. "(…) the negative answer given by the Court is mainly based on the alleged nonexistence of a normative conflict between the norms of ius cogens violated by the appellant and the customary rule on the immunity of foreign states from civil jurisdiction for iure imperii acts (parr. 93ss). It should also be noted that the Court, despite having identified the characteristic trait of the norms of ius cogens in their inviolability ("[a] jus cogens rule is one from which no derogation is permitted": par. 95), has implicitly admitted, without, however, exploring the possible implications, a potential extension of the scope of application of the category, beyond the original provision of art. 53 of the Vienna Convention on the Law of Treaties, to conflict with the rules of general international law (para. 93) (…)".

a position is certainly the jurisprudence of the International Court of Justice (ICJ) (Roberts, 2001; Liakopoulos, 2020a)[78] which for years has been based on the dualist theory as the object of profound and at the same time light attention paid to the statement of the existence of a new customary norm and to its constituent elements (Dekker, Werner, 2014; Oude Elferink, 2014; Kaczorowska-Ireland, 2015; Buga, 2018; Liakopoulos, 2020a)[79].

Continental shelf (Libyan Arab Jamahiriya v. Malta), application of intervene, ICJ Reports 1984, p.22, par. 27: "(…) it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of states (...)". Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ, Request for an Advisory Opinion) Written Statement of the African Union (1 March 2018) par. 149.

[78]"(…) Modern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes opinio juris rather than state practice because it relies primarily on statements rather than actions (...)".

[79]ICJ, North Sea continental shelf (Denmark v. Federal Republic of Germany), ICJ Reports of 20 February 1969, par. 88. See also the sentence of 20 November 1950 and of 27 August 1952 (Colombian-Peruvian asylum case, judgment of November 20th, 1950, ICJ Reports 1950, p. 276). According to ICJ to decide on the counterclaim of Peru (concerning the alleged violation by Colombia of the Havana convention on the right of asylum), the aforementioned Court "examinât si le Gouvernement du Pérou avait établi que Haye and the Torre avait été accuser de délits de droit

Modern conceptions of custom tend towards the element of opinio juris in a self-referential manner which ends up shifting to the nature of custom with the risk of transforming custom into a simple representation (Kennedy, 2000; Crawford, 2011; Sobenes Obregon, Samson, 2017; D'Aspremont, 2019; Liakopoulos, 2020a)[80] called to confirm the existence of an identified norm

commun avant the date laquelle the asylum (…) été accorde, c'est-à-dire avant le 3 janvier 1949: the cour a constaté que le Gouvernement du Pérou n'en avait pas brought the preuve. La cour n'a statue sur aucune autre question à cet égard (...)", in ICJ Reports, 1950, par. 402. Inaccord to ICJ the limited scope of this decision did not allow us to consider re-enclosed the interpretative test subjected by Colombia with the new judgment, aimed at establishing whether "L'arrêt du 20 novembre 1950 doit-il être interprété dans le sens que la qualification faite par l'ambassadeur de Colombe du délit imputé à M. Haya de la Torre fut correcte et que, par conséquent, il y a lieu de reconnaître des effets juridiques à la qualification susmentionnée, en tant qu'elle a été confirmée par la Cour? (...)", ICJ Reports, 1950, parr. 399ss.

[80]ICJ, Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), merits, judgment, in ICJ Reports 1986, op. 32, par. 44. In the same orientation was expressed also judge R. Ago in the separate opinion alleged in the sentence which is stated that: "(...) It can never be sufficiently emphasized that acceptance of court compulsory jurisdiction on the basis of art. 36, par. 2 of ICJ Statute is a sovereign, voluntary act the effects of which are strictly confined to the limits within which it was conceived and intended (...)" (par. 83). See also the Case concerning delimitation of the maritime boundary of the Gulf of Maine Area

where the subjective element remains outside of state practice (Kirgis, 1987; D'Amato, 1987; Scharf, 2013). Custom without practice in the international community is a legal void that transforms into rules of courtesy without specific obligations at the international level (Haggenmacher, 1986; Danilenko, 1993)[81].

Conclusions on the identification of customary law of 2018 through ILC's work

A rigid dualistic approach is addressed from a different perspective which makes use of a process of fragmentation of international law into practice[82]. The fragmentation and

(Canada v. United States of America), Judgement of 12 October 1984 given by the Chamber constituted by the Order made by the Court on 20 January 1982, in ICJ Reports 1984, p. 246 ss., par. 111. According to Aspremont: "(…) with the Nicaragua judgment, the consensus around the dualistic approach to custom unravelled and the admiring scholarship turned itself into a noisy and cacophonic sounding board for a myriad of new approaches to custom-ascertainment (...)".

[81]According to Haggenmacher: "(…) les deux prétendus éléments n'ont en réalité aucune individualité propre: ils se trouvent inextricablement mêlés au sein d'une "pratique" unitaire. Cette pratique forme pour ainsi dire un seul "élément" complexe, fait d'aspects "matériels" et "psychologiques (…)".

[82]Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur, A/CN.4/672, 22 May 2014, par. 28.

sectoralization of the international legal system is a continuous struggle that has engaged the international community for years as well as the working groups of the ILC (Hafner, 2000; Dupuy, 2002; Conforti, 2002; Andenas, Bjorge, 2015; Peters, 2017)[83]. Customary legislation consolidates barriers between the various sectors of international law as methods of application, as factors of mutual incommunicability, favoring the sedimentation of in homogeneity between the same regulatory areas. These are instrumental rules of international law that erect the defense of the unity and homogeneity of the system against the threats of fragmentation. Customary law presents itself as a vehicle for transfer and adoption in the international legal system. Within this context the Special Rapporteur spoke to us about: "(...) the simultaneous presence of usus and opinio juris risks artificially dividing international law into separate fields, which would run counter to the systemic nature of international law (...)"[84]. Reading

[83]See the program of: "Risks ensuing from fragmentation of international law", cfr. Yearbook of the International Law Commission, 2000, vol, II, parte 2, p. 131. See also the Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682, 13 April 2006, and the Draft conclusion of the work of the Study Group, U.N. Doc. A/CN.4/L.682/Add.1, 2 May 2006.

[84]M. WOOD, Second Report on identification of customary international law

the articles of the project of the ILC we note that one of the objectives was the safeguarding and consolidation of the international system which has become the guide of the work as well as of the customary international norms regarding unilateral sanctions with extraterritorial application (Murphy, 2014; Debartolo, 2014; Swaine, 2014; Oxman, 2014; Odermatt, 2017; Arajärvi, 2017; Deplano, 2017; Nolte, 2019).

The second paragraph already takes into consideration the text of Art. 38 of the Statute of the ICJ indicating the need for traditional constitutive elements, namely: "(…) a general practice that is accepted as law (opinio juris) (…) (Liakopoulos, 2020a)[85]. The commentary text specified that the presence of the two constituent elements are not sufficient to ascertain a norm as customary (Mendelson, 1999). Continuing with par. 3 it is established that each of the constituent elements should be "separately

Doc. A/CN.4/672, 2014.

[85]Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/68/10, chapter IV, sect. C, para. 121. The Commentary of the draft articles affirms that: "(…) one must look at what states actually do a seek to determine whether they recognize an obligation or a rights to act in that way. This methodology (…) serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exists (...)".

ascertained" (D'Aspremont, 2019)[86], a position confirmed in conclusions no. 6 and 10 that the elements can be taken into consideration as "forms of practice" and/or "forms of evidence of acceptance" of the opinio juris (Nolte, 2019).

Conclusion n. 4 is one of the most questionable paragraphs because it excludes these behaviors which cannot contribute to the formation of a habit and especially of the large number of subjects who respect the protection of human rights, economic law and active interventions[87] such as attribution attitudes to work of

[86]According to Aspremont: "(...) Conclusions 6 and 10 of the International Law Commission not only contradict Conclusion 3 on the requirement of distinct ascertainment of each element but also bring an end to the dualism that was initiated in the Lotus case and generalized in the Asylum case: since it suffices to scrutinize the same material to extract custom, such material becomes "evidence of a general practice, which is accepted as law" as this was understood in 1920 (...)".

[87]Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/68/10, chap. IV, sect. C, para. 38), conclusion 5: "Other conduct, including by non-state actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty (...)". Par. 3 of the 4th Conclusion affirms that: "(…) conduct of other actors (…) may be relevant when assessing the practice referred to in paragraph 1 and 2 (...)". See also: A/CN.4/SR.3226. A/C.6/69/SR.25, par. 83; A/C.6/69/SR.26, par. 85; e A/C.6/69/SR.27, par. 15.

international organizations (Wood, Sender, 2017; Nolte, 2019)[88]. The matter of sanctions, especially extraterritorial ones, remains to state practice where international organizations according to par. 12 are understood as contributions forming a negative custom and being against sanctions (Audit, Pataut, 2020).

Conclusion n. 6 moves from the jurisprudence of the ICJ and states that the material element of custom, i.e. usus, results from physical and verbal acts as well as from clear inaction (D'Amato, 1998). In particular, the ILC specified that: "(...) under certain circumstances and (…) only deliberate abstention from acting may serve such a role (…)" (De Frouville, Decaux, 2020). Situations covered by precision in which it is clear that the state is aware of the conduct a priori and that: "(...) cannot simply be assumed that abstention from acting is deliberate (...)"[89]. Inaction

[88]M. WOOD, Third Report on identification of customary international law Doc. A/CN.4/682, 2015. A/CN.4/SR.3251, p. 4; A/CN.4/SR.3251, p. 8; A/CN.4/SR.3251, p. 11; e A/CN.4/SR.3254, p. 9, "(…) whose subject matter falls within the mandate of the organization (…) [w]hile international organizations often serve as arenas or catalysts for state practice (...)". ILC, Identification of customary international law. Comments and observations received from Governments, U.N. Doc. A/CN.4/716 (2018); Fifth report on the identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/717, 14 March 2018, para 38-39.

[89]See Conclusion n. 10, par. 2 which is affirmed that: "(…) silence on the part of one or more parties may constitute acceptance of the subsequent practice

is an issue that is crucial to the opinio juris and according to the recital n. 10 the lack of reactions constitutes in tempis the proof of opinio juris, i.e. the acceptance of the behavior of others as licit and only if the states were ready to react (Wood, Sender, 2017)[90].
In conclusion no. 6 have listed by way of example the consolidation of the forms that state practice can take, i.e. acts of the executive, diplomatic, legislative, administrative acts, that is "operational conduct on the ground" including national sentences, the activities of the treaties and the resolutions of bodies of organizations.
Conclusion no. 8 precisely confirmed the scope and results of international jurisprudence, i.e. the behavior of all states, members of the international community but also widespread and representative practice, where it is stated: "(…) it must be sufficiently widespread and representative, as well as consistent to (…) a virtually uniform usage (…)" (Kunoy, 2011; Tuerk, 2012; Magnùsson, 2015)[91]. The commentary excluded the universality

when the circumstances call for some reaction (...)".

[90]"To "actual assertions of sovereignty (Judge Read in the Fisheries Case [United Kingdom v Norway] [1951] ICJ Rep 116, by states, such as passage over territory, impounding of fishing boats, passage of ships in international waterways, and battlefield behaviour".

[91]ICJ, North Sea continental shelf (Denmark v. Federal Republic of Germany) order of 8 March 1967, ICJ Reports 1967, p. 3.

requirements necessary for behavior that comes from a high number of representative states of the international community and those affected by the application of rule[92]. The consistency requirement takes up the rulings of the general consistency of the jurisprudential attitude of the ICJ. Par. 2 of the conclusion n. 8 recognized whether or not the time period is sufficiently necessary: "(…) in a very widespread and representative participation (…) should have been both extensive and virtually uniform in the sense of the [rule] invoked (…)" (Dupuy, Kerbrat, 2020). The element of practice is connected to the opinio juris based on the relationship of proportionality and in the form of the temporal element, spreading in tempis the development of the opinio juris necessary to constitute the custom.

Customary rules and unilateral sanctions. Hypothetical approaches and questionable reconstructions

From the moment in which the Security Council (SC) of the UN is blocked by the right of veto, rewarding political and less juridical

[92]Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), op. cit., par. 186. North Sea continental shelf (Denmark v. Federal Republic of Germany) order of 8 March 1967, op. cit., and the dissenting opinion of judge Tanaka, par. 175: "(…) cannot be mathematically and uniformly decided (...)".

choices, the inertia to react and intervene in situations that require such as that established by Chapter VII would require a safeguard and restoration for international peace and security in multilateral matters achieving the objectives and opening up unilateral action (Trachtman, 2013; Alland, 2021)[93]. The codification of 1996 (Liakopoulos, 2020b) already provided for the proposal of a procedural mechanism for ascertaining erga omnes offenses in a precise but highly questionable manner in terms of its effectiveness in practice. The project was already weakened in this

[93]According to Trachtman: "(…) the state's continuing centrality is supported by three forces: (i) its continuing ability to respond to many cooperation problems that fit well within its borders; (ii) path dependence, which makes it difficult to move to other systems of order given the existing Westphalian paradigm; and (iii) network externalities which similarly support isomorphism among states (…) international law generally begins with the demands of a single state: plurilateralism and multilateralism begin with unilateralism (…) as opposed to non-legal, or informal methods for cooperation (…) made by strategic states willing to reduce their autonomy along certain dimensions in order to increase the satisfaction of their preferences along other dimensions (…) where an international transaction-one type of which is international law-could result in a political surplus, that surplus may induce a coalition to act to achieve it. Autonomous, sovereign states would be expected to enter into international law as an exercise of their efforts to maximize the achievement of their preferences (...) these vertical structures include the international legal order itself, as well as particular treaties, arrangements, and institutions by which states share power in the international legal system (...)".

matter and eliminated those rules intended to regulate the aggravated and assumable reactions of states with respect to erga omnes offences. The situations of serious international crimes and political situations caused by the SC of the UN have had as their consequences the project of removing the intervention of states from a collective and vertical channel of action compared to the one pre-established and developed from the beginning within the framework of the UN. To safeguard the SC of the UN it was preferred to place every external action on an ineffective plan of a purely horizontal action (Alvarez, 2000)[94].

Therefore the European Union as well as the UN adopt sanctions without specific coordination with which it is not possible to intervene and to believe that the intervention is insufficient due to the measures adopted which go beyond those decided by the SC itself. Unilateral actions, even if they do not have and do not represent elements of an international offense, make the affected state react to unilateral measures, thus representing a system with perspectives and beliefs that an unwritten legal rule imposes the adoption of ineffective measures at a multilateral level. The seeds

[94]"(…) central paradox of our age-one not restricted to the United States-namely that the search for political, military or economic security through transnational institutions to which we transfer competences previously reserved to national institutions generates powerful insecurities and anxieties, even among the leaders of the most powerful nation on earth (...)".

of a customary norm allow the imposition of unilateral sanctions for the maintenance of international peace and security.
Thus a customary rule that is formed does not cover and does not legitimize all unilateral sanctions but only those that have to do with specific areas of action in sanctions and in a technical sense, i.e. those of the SC, where the SC itself fails in concrete terms to adopt. This is an emerging phenomenon of a category of customary norms such as remedy norms, i.e. customs where the international community develops a legally required behavior of a multilateral intervention while safeguarding one of the fundamental purposes of its action. The multilateral approach is the basis of the healthy life of every international relationship, safeguarding the final objectives which are the maintenance of international peace and security. But do these objectives go well with sanctions? Perhaps every time the failure to resolve a dispute have the precise results to deal with a war or other situations perceived to be of an economic and disastrous nature, the sanctions in practice take the form not of the safeguarding of fundamental values but of a space for unilateral action that recognizes and protects the principles of general international law.
Thus custom presents itself as a source of general law which gives life to norms of particular law, i.e. transforming into a source of law only those states which with their own practice participate in a

formation procedure showing guidance to a specific opinio juris. We can speak of a custom of a particular form that creates rules of international law that bind a certain number of states (Sarmiento Lamus, 2013; Rylatt, 2013; Cogan, 2016; Talmon, 2016)[95]. The rule would be enforceable only in inter se relations and thus the legitimate use of unilateral sanctions is allowed only against those countries which have participated in their own behavior and accept this practice (Hufbauer, 2007).

The polarization of unilateral sanctions includes some groups of states. Countries that apply sanctions as a tool and those that use them as targets, i.e. conduct variously intended to jeopardize international peace and security. The construction of new and particular rules overcoming the general ones has as a consequence the absence of a practice, i.e. uniform and constant usus which spreads in support of a customary rule which operates in this sense. The restrictive measures adopted unilaterally have shown various positions of thought. In particular, when the General Assembly of the UN was already asking to take into consideration: "(…) urgent and effective measures to eliminate the use by some developed countries of unilateral economic coercive

[95]Rights of passage over Indian territory (Portugal v. India), preliminary objections judgment, ICJ Reports 1957, pp. 125, 152. Dispute regarding Navigational and Related Rights (Costa Rica/Nicaragua), sentence of 13 July 2009, in ICJ Reports 2009, p. 265 ss.

measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles contained in the Charter of the United Nations, as a means of forcibly imposing the will of one state on another (…) stated that unilateral sanctions would constitute a form of coercion contrary to a series of principles of international law such as, first of all, that of non-intervention in the internal and external affairs of a sovereign state, also highlighting in particularly critical tones the adverse effects of such measures on the enjoyment of a series of human rights (…)" (Liakopoulos, 2020a).

These measures observe protests and identify the evolution of international law as measures that: "(…) double standards or imposition by some states of their will on other states (...) can defeat the objects and purposes of measures imposed by the Security Council, and undermine their integrity and effectiveness (…)" (Liakopoulos, 2020a). Both international jurisprudence and the ILC have declined the concept of diffusion necessary for the behavior of all members of the international community. The behavior of especially small states is sufficient in the practice of a corresponding inaction by other states legitimated to protest by accepting the sanctions as legitimate. Protests and lax conditions may be prohibited under international law. The existence of a prohibition and the sedimentation of a usus and opinion juris that

emerge from a customary norm does not, however, exist in practice. The resolutions of the UN are many and are adopted with a greater tendency to give certainty to the existing claim of a customary norm in statu nascendi as an objective element of diuturnitas and of the simultaneous diffusion of a certain opinion juris.

ILC's conclusions on the identification of customary law have adopted a rather clear position through the resolutions of the General Assembly of the UN. The value attributed to such acts forms a rule of general international law which has not been precisely addressed by the ILC (Arajärvi, 2017). The political nature of the General Assembly of the UN "or other non-legal considerations (…) ascertaining acceptance as law (opinio juris) from such resolutions must be done with all due caution (…)" (Thirlway, 2019)[96].

The ILC thus argued that this type of resolutions express the point of view of member states and international organizations and

[96]Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), op. cit., par. 38 "(…) The General Assembly is a political organ in which it is often far from clear that their [Member States'] acts carry juridical significance (...)". A/CN.4/SR.3251 and A/CN.4/SR.3301 ("(…) there was an unfortunate trend to downplay the significance of resolutions, which constitute[d] one of the most easily identifiable and accessible forms of practice (...)").

similarly as regards treaties it is demonstrated that such resolutions have given rise to a general practice that is accepted as opinion juris law. The ILC thus took up a position that was based on the jurisprudence of the ICJ (Liakopoulos, 2020a)[97] where the resolutions of international organizations cannot create a rule of customary law but simply constitute evidence that is based on the conclusions 6 and 10 of state practice and on the opinio juris thus determining the existence and content of a custom as a contribution to the development of international law[98].

[97]Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), op. cit., par. 188: "(…) opinio juris may, with all due caution, be deduced, from inter alia, the attitude of the parties and the attitude of states towards certain General Assembly resolutions (...)". Legality of the threat or use of nuclear weapons, advisory opinion of 8 July 1996, ICJ Reports 1996, p. 239, par. 70: "(…) General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character (…)".

[98]According to par. 3 of the conclusion no. 12: "(…) a conclusive evidence of the existence and content of rules of customary international law (...) other evidence is thus required, in particular to show whether the alleged rule is in fact observed in state practice (...)".

The existence of evidence suitable to demonstrate a customary norm makes the use of unilateral sanctions lawful and in cases of actions that safeguard certain fundamental values, the maintenance of peace and security of the international community appears possible to be considered as a model for the formation of a customary norm which prohibits the use of this type of measure.

Absence of customary rules and use of unilateral sanctions. The controversial medal and Art. 54 of the 2001 Project

It is noted that Art. 54 of the 2001 Project allows the use of collective countermeasures, measures that include unilateral sanctions that non-aggrieved states can face for violations of norms establishing joint and several bonds (erga omnes or erga omnes partes norms). However, it is a "limited and rather embryonic" practice (Tams, 2010; Dawidowicz, 2017) which limits itself to recalling without prejudice the right of the state not directly affected to adopt them.

The practice is highly developed and the birth of a new customary norm is affirmed which makes the use of a particular type of countermeasures lawful in a superficial way and applied to the existence of constitutive elements of a usus and opinio juris custom. The subjective element of the opinio juris affirms the

basis of a reasoning that allows us to talk about the impossibility of tracing state declarations to the notion of collective countermeasure and by evaluating the existence or not of the opinio juris, so the behavior would not be legally obligatory. The "birth" of a customary norm prefaces the nascent norm in question. The element of criticism lies in the impossibility of affirming the emergence of a customary norm of doing in the face of weak evidence of the existence of opinio juris, i.e. the belief that the behavior complies with the law, i.e. the decisive element for the birth and affirmation, evolution of international law. States are not worried about declining their behavior and for the international community the lack of certain references having to do with collective countermeasures in the declarations of states that are making or have made an appeal that is not an absolute and surprising novelty. The absence of institutions of international law is a constant and widespread method as well as uniform across the entire community of states. The affirmative non-emergence of a customary norm makes the use of collective countermeasures legitimate. The needs and characteristics of international and customary law norms have created a detailed regulation of the behaviors required of states in different situations as prospective values that states are oriented towards this type of conduct. These fundamental rules guide action in a perspective of coexistence of

other subjects and cooperation (Friedmann, 1964)[99].

The affirmation of unilateral behaviors connected with the adoption of collective countermeasures also represents a risky prospect, especially when it comes to behaviors that can be abused by various states. It does not seem useless to ask at what point this risk is acceptable and whether it can undermine the international community itself and the fundamental principles that guide action. International law is a permissive legal system that excludes the lawfulness of certain behaviors unless there is a permissive rule to the contrary as a consequence that any action motivated by the intention to react to alleged serious violations of international law can indissolubly alter its character. In this way the emergence of a customary norm respects a certain value which acts as an obstacle to the protection of the system and falls into a naturalistic dimension which it seeks to avoid. This is not an ethical value but a systemic value that serves to affirm the emergence of a customary and rather affirmative norm of non-emergence.

The material element, i.e. the usus, does not appear in the analysis of the conduct as in the requirements of diffusion, uniformity and

[99]"(…) In international law it is today of both theoretical and practical importance to distinguish between the international law of "coexistence", governing essentially diplomatic inter-state relations, and the international law of "cooperation", expressed in the growing structure of international organization and the pursuit of common human interests (...)".

constancy. Obviously both the European Union and other members of the international community, for example from the Asian continent: ASEAN do not react or have considered the use of countermeasures as legitimate according to Art. 54 of the 2001 Project (Liakopoulos, 2020b). A polarization position that operates in the case of unilateral sanctions as a constant and surprising character that considers unilateral sanctions to be similar to collective countermeasures. These assessments have a quantitative nature of the behaviors and a qualitative assessment of these subjects which risk making the practice of unilateral sanctions lawful through the emergence of a customary norm as the legitimation of naturalistic positions which the law binds the international community as a whole as a result of practice but also as a pursuit of the development of international law that should be based. This is not an ethical relativism that characterizes the marked decentralization of the current state of evolution as the central body with the prerogative of filtering values called to inform this order. Respect for some rights such as those for example that have to do with the protection of human rights have seen that states use this sensitive type of respect for human rights as a justification for the adoption of their own unilateral sanctions. The exclusion of natural law positions in a system without effective internal guarantee mechanisms such as the international

one represents a risk that is difficult to overcome and insurmountable given that it is connected with the application of unilateral sanctions instruments linked to political choices made by each state.

Customary rule that prohibits the use of sanctions of an extraterritorial nature

Sanctions with an extraterritorial nature represent a particular dimension of action due to the plurality of measures that can take countermeasures with extraterritorial effects and measures that can take on a different guise. Countermeasures with extraterritorial effects where their illegality is excluded because the countermeasures operate in the logic of the law of the codification of the 2001 Project as the cause of the exclusion of the illegality. Even under acts of retaliation with extraterritorial effects, i.e. reactions of a political and unfriendly but not illicit nature. Extraterritorial measures operate in the form of sanctions which are configured as measures that can generate international responsibility that are assumed for an offense of others that justify them as a response to the imperative of protecting internal security. This is a particular cause of justification, given that it allows the state that adopts it a certain type of legal freedom to

decide on the mandatory measures that this system includes. It is of a non-legal nature but of a more economic nature, i.e. based on the use of sanctions with extraterritorial application which reflects the asymmetric hierarchy that exists between states and the structural inequalities that permeate the life of international relations. The use of this type of measures are based on the relationship between the economic strength that the subject adopts them and the absolute centrality of each currency, especially the dollar as a point of reference for today's economic reality. The weakness of the subjects who suffer the effects as consequences of measures especially from small, poor countries and with economic problems their destiny is to conform to a certain behavior which in reality is requested by a strong country.

It seems clear that sanctions with extraterritorial application represent an expression of a type of unilateralism considered for the conduct of the international community's life. A unilateral act is absolutely and always not illicit. A unilateral act is also a responsible act in which another state can appeal against a very complex system which also includes the inability of the Security Council to achieve the main objectives which are those of international peace and security. The problem is not sanctions of an extraterritorial nature such as certain claims to exercise one's jurisdiction but the limits that international law can impose on the

exercise of extraterritorial jurisdiction. The reference to the criteria of nationality and territoriality disappears and the interpretations of application of the criteria of jurisdictional connection such as that of protection are very aggressive and fuel a practice of countermeasures nourished in theory and practice.

Of course, the regulatory instruments that present themselves as blocking regulations imposed against the sanctions and against the subjects who respect and comply with the content of the extraterritorial sanction ensure the non-recognition of those sentences by the courts and the secondary measures they give to the execution. These are countermeasures that presuppose the wrongdoing of others and are all the subjects who resort to the international illegality of sanctions, especially American ones with extraterritorial application and as consequences the related reactions perhaps at a global level. Extraterritorial sanctions have an effectiveness that allows the possibility of adopting unilateral reaction measures reserved for those countries that hold real reaction power. Within this context, other countries with less economic weight also respect and apply the sanction as the only recourse to an international court or tribunal.

Concluding remarks

Economic sanctions nowadays have a protest character and are clearly political in nature despite the fact that diplomatic complaints are formulated by members of international society against the use of varied measures where the adoption of blocking regulations lead to non-recognition by part of national courts and foreign laws that have judicial effects on decisions that implement, represent an undoubted confirmation of a particular type of sanctions in contrast with fundamental principles of international law which are oriented towards the theories of non-interference in the internal affairs of another state such as illicit conduct.

A customary law makes sanctions with extraterritorial effects lawful at the moment of their formation, thus asking whether at the moment of formation the use of such sanctions adopted as a result of responding to an offense of others is prohibited. Over the years, states have held a clear and decisive position on the failure of various attempts to move towards a concrete codification of the matter in the exercise of jurisdiction with regards to sanctions, including extraterritorial ones, such as illicit conduct of some states. Perhaps the use of protests by various members of the international community and in a widespread, constant and uniform manner is the basis for the adoption of measures that show the opinio juris conviction of being moved towards reactive

behavior and against the wrongdoing of others. But is it so? Is there a difference between reaction and adoption of sanctions of all kinds and international responsibility and customary norms? In reality, we can say that even when dealing with profiles linked to the adoption of unilateral economic measures, the non-permission of consensus at an international level for the adoption of shared documents makes us think that the provision of technical tools to declare the illicitness of this typology of measures is indisputable and that greater courage is needed from the international community to go beyond the political nature of the topic and move towards a useful independence as a lively codification activity to eliminate the illegality of practices from a conduct adopted out of place and with purposes other than those clarified ab initio.

Greater maturity and a conscious approach are needed in the matter of unilateral sanctions where an absolute prohibition of unilateral sanctions is needed, understanding the customary law as a rule safeguarding the multilateral character of the society of states and of the legal system that regulates this type of conduct. The application of this type of sanctions relating to reactions continues to be managed on an exclusive basis of unilateral relations and between the economic and most “prestigious” powers on the diplomatic chessboard at a global level. We do not

consider the United States as protagonists but other countries that also need an identification of the rules of customary law without excluding domestic law as capable of producing effects. A nice, very flexible solution, rightly based on general international law, but certainly contrasting with the needs that a codification project should have satisfied.

States, which engage in “politics” and do not know, as far as can be believed, an effective and sufficiently perfect and conclusive project, do not seem, despite being part of the coalition, capable of taking into account the “legal” terms of the coalition itself. The continuous tendency to independently evaluate some partial segments of the overall operation of the states that unilaterally try to impose their strength in various sectors and without legally coordinated (which operates in place of the UN), is a coalition that has to take the lead of the entire operation and its consequences. Of course the difficulties are extensive and above all the occurrence although evidently of the role of the UN Security Council. The situation is becoming increasingly complex and difficult for the United States itself due to the difficulty of precisely determining the field of application of unilateral interventions of all kinds to each foreign state with a purpose that is not always clear, the initial war operation and various situations of conflict as we have seen within the Arab world, between

extremist groups of different origins, and of the growing rivalry especially between Sunnis and Shiites and beyond.

The development of erga omnes obligations (with their importance in the context of state responsibility project) over the last thirty years clearly affects the way of being and operating both within the ILC and the UN with a perspective of obligations in question and as a result the general processes of transformation that will produce the results alongside the phenomenon of legal globalization now and in every modern society. The developments that follow in time will necessarily be concise and concern two issues of great importance: on the one hand, the weakening of the sovereignty of the states as governing bodies of the communities settled in their respective territories; and on the other hand the progressive erosion of the traditional role that was succeeded and remained indisputable by the Westphalian system, due to the emergence of a compact and new international order in the era including new actors and subjects coming from and operating in civil society.

We can now speak of a crisis of traditional representative democracy, and therefore of the constitutional state of law which is based on the primacy of the law, on the division of powers, and on the authority of the government. In modern state systems, influenced by the continuous path of globalization, this traditional

model has been progressively replaced by governance policies, by decision-making processes based on decentralized and more inclusive forms of participation of individuals and/or organizations, including private ones, which in reality are involved in the problems to be solved. But what do they solve?

Perhaps all or nothing, given the formal elements indicated by the work of the ILC, they are at first sight considered suitable to describe a new regulatory and codificative form based no longer on traditional and past-tense sovereignty but on the multiplication of informal governance hypotheses, made up of "open" guidance lines and decision-making processes, which are binding but still need a lot of work. Every state faced with these new codification rules clearly finds obstacles to the hypothetical development of constant international solidarity, capable of translating into strong forms of cooperation with other states, as necessary elements for the management of international common goods, and/or the possible imposition of "collective" sanctions in reaction to serious offenses affecting the current world system. So the problem is collective sanctions and not unilateral ones.

The problem is not that. But it is precisely that of reducing any type of sanctions or rather not arriving at any type of sanctions. In our opinion, the model indicated is not theoretically well equipped to supplant the traditional forms of state democracy, which still

suffer from weaknesses that are at least in principle (and hopefully) not irreversible. UN governance has failed to materialize as a “way in which the global economy attempts to govern politics”. The economic system, as we have recently seen also with the pandemic, has assumed a selective financial capitalism and a decisive autonomy of the strong which undermines the basis of the traditional forms of democracy, quite unable to function due to the growing inequality not between men, and the disturbing development of corruption phenomena, on a local and planetary scale but also to the political weakness of developing constant cooperation between states while remaining firm on the codifying rules of international law and beyond (Trachtman, 2013).

The overcoming in theory and practice of the traditional “Westphalian model” has imposed positions in favor of a “pan-human” vertical international order based on a new role for “humanity” and for “individuals”. The variable confusion between “community of states” and “international civil society” has allowed us to speak of a construction of global law which is based on a top-down evolution of the international order despite the variety of various theoretical reconstructions. The practice of states and international acts confirm a path oriented towards vertical changes in the international community as well as the idea

that verticalization promises to integrate the activities of global forces (states, international governmental and non-governmental organizations and organized communities) with the supervision of the United Nations operating as manager of the international order, even without managing to resolve all the problems every time. The process of verticalization is now different from that of centralization of international power (of protection and implementation of objective law) in the prevailing social forces (hegemonic states), operating in the universe towards situations of structural decentralization and without any superior control (superiorem non recongnoscentes). An idea of verticalization of the international community which is realized with the birth of the UN of a centralization in its bodies occupied with the fundamental social functions of production and implementation of general law. This type of thesis proposes the substitution of the UN for the substantive community by including the role of the ICJ and entrusting to the General Assembly the functions as a world legislator carried out through declarations of principles and to the Security Council the function of guarantor of world public order by virtue of the coercive powers conferred on him by Chapter VII of the UN Charter by taking and giving new codification lessons within the ILC. Thus, a different management of certain erga omnes obligations is formed on the external level and on the

internal level the increased “democratic” perspective for the protection of the rights in question in the future as well.

We need a perspective where states will create those new functions that will be suitable to satisfy the formation and implementation of erga omnes obligations. The changes and additions to international law are necessary and effectively allow for the same obligations. The discussion is complex and will continue for years given the lack of the necessary improvement of forms of regulation of erga omnes obligations suitable for specifying their content, the scope of regulation of these obligations, also calculating the permitted reactions. Customary obligations are intended to develop the international community, giving rise to different, new regulatory regimes that will protect the relevant assets between the distribution of states, legitimizing them to act and/or react in the face of a definition and management of illicit facts and so on.

References

Aledo, L.A. (2021). *Le droit international public.* Dalloz, Paris.

Alland, D. (2021). *Manuel de droit international public.* PUF, Paris.

Allen, S. (2014). *The Chagos islanders and international law*. Hart Publishing, Oxford & Oregon, Portland, 9ss.

Alvarez, J. (2000). Multilateralism and its discontents. *European Journal of International Law (11),* 397ss.

Alvarez, J. (2020). The relativity apocalipse is night. *American Journal of International Law Unbound (114)*, 80.

Andenas, M., Bjorge, J. (eds). (2015). *A farewell to fragmentation. Reassertion and convergence in international law.* Cambridge University Press, Cambridge.

Arajärvi, J. (2017). From the "demands of humanity": The formulation of opinio juris in decisions of international criminal tribunals and the need for a renewed emphasis on state practice. In R. Lepard (eds). *Reexamining customary international law.* Cambridge University Press, Cambridge. 192ss.

Arajärvi, J. (2017). The requisite rigour in the identification of customary international law: A look at the reports of the Special Rapporteur of the International Law Commission. *International Community Law Review (19),* 10 ss.

Audit, M., Pataut, E. (2020). *L'extraterritorialitè.* Pedone, Paris.

Baxter, R.R. (1970). *Treaties and custom*. Recueil des Cours, ed. Brill, Bruxelles, vol. 129, 64ss.

Bhatt, K. (2018). A post-colonial legal approach to the Chagos case and the (dis)application of land rights norms. *International Journal of Law in Context, 15,* 5ss.

Bianchi, A. (2017). Choice and (the awareness of) its consequences: ICJ's "structural bias" strikes again in the Marshall Islands case. *American Journal of International Law Unbound, 86.*

Brunèe, J. (2000). Multilateralism in crisis. *European Journal of International Law (11).*

Buga, I. (2018). *Modification of treaties by subsequent practice.* Oxford University Press, Oxford.

Choi, S., Gulati, M. (2016). Customary international law: How do courts do it?. In C.A. Bradley (eds). *Custom's future.* Cambridge University Press, Cambridge, 128ss.

Cogan, J.K. (2016). Certain activities carried out by Nicaragua in the border area (Costa Rican v. Nicaragua) construction of a road in Costa Rican along the San Juan River (Nicaragua v. Costa Rican). *American Journal of International Law, 110 (2),* 322ss.

Conforti, B. (2002). L'Unitè et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!". *Revue Gènèrale de Droit International Public (111),* 8ss.

Conforti, B. (2012). The judgment of the International Court of Justice on the immunity of foreign states: A missed opportunity. *Italian Yearbook of International Law (21)*, 38ss.

Crawford, J. (2012). *Brownlie's principles of public international law*. Oxford University Press, Oxford.

Crawford, J.R. (2011). Military and paramilitary activities in and against Nicaragua case (Nicaragua v. United States of America). *Max Planck Encyclopedia of Public International Law.*

D'Amato, (1998). Customary international law: A reformulation. *International Legal Theory (4),* 5ss.

D'Amato, A.A. (1987). Trashing customary international law. *American Journal of International Law (81),* 104ss.

D'Aspremont, J. (2016). Expansionism and the sources of international human rights law. *Israel Yearbook of International Human Rights (46),* 227ss.

D'Aspremont, J. (2016). The decay of modern customary international law in spite of scholarly heroism. *Global Community Yearbook of International Law and Jurisprudence,* 210ss.

D'Aspremont, J. (2019). The four lives of customary international law. *International Community Law Review (21),* 232ss.

Damrosch, L.S. (1997). *Enforcing international law through non-forcible measures.* Recueil des Cours, ed. Brill, Bruxelles, vol. 269.

Danilenko, G.M. (1993). *Law-making in the international community.* Martinus Nijhoff Publishers, The Hague, 84ss.
Daudet, Y. (2020). *1919-2019, la flux du multilatéralisme.* Recueil des Cours, ed. Brill, Bruxelles, vol. 403, 23ss.
Dawidowicz, M. (2017). *Third-party countermeasures in international law.* Cambridge University Press, Cambridge, 77.
De Frouville, O., Decaux, E. (2020). *Droit international public.* Dalloz, Paris.
Debartolo, D.M. (2014). Identifying International Organizations' contributions to custom. *American Journal of International Law Unbound (108),* 178ss.
Dekker, I.F., Werner, W.G. (2014). *Governance and international legal theory.* ed. Springer, Berlin.
Dinstein, Y. (2006). *The interaction between customary international law and treaties*. Recueil des Cours, ed. Brill, Bruxelles, vol. 322, 385ss.
Dupuy, P.M. (2000). The place and role of unilateralism in contemporary international law. *The European Journal of International Law (11),* 27.
Dupuy, P.M. (2002). *L'unitè de l'ordre juridique international.* Recueil des Cours, ed. Brill, Bruxelles, vol. 297, 12ss.
Dupuy, P.M. (2020). Prosper Weil's article: A stimulating warning. *American Jorunal of International Law Unbound (114),* 71ss.

Dupuy, P.M., Kerbrat, Y. (2020). *Droit international public.* Dalloz, Paris

Ferguson, Y.H., Mansbach, R.W. (2018). The decline of the liberal global order and the revival of nationalism. *The Global Community Yearbook of International Law and Jurisprudence,* 32ss.

Friedmann, W. (1964). *The changing structure of international law.* Stevens & Sons, London.

Geeiger, R. (2018). Taking decisions on customary international law by the International Court of Justice in the case jurisdictional immunities of the state (Germany v. Italy; Greece intervening). *Wroclaw Review of Law, Administration & Economics (8),* 238ss.

Goldsmith, J., Togawa Mercer S. (2018). International law and institutions in the Trump era. *German Yearbook of International Law (61),* 22ss.

Goldsmith, J.A., Posner, E.A. (1999). A theory of customary international law. *University of Chicago Law Review (66),* 1115ss.

Gradoni, L. (2019). Un-procedural customary law. *Journal of International Dispute Settlement (19)*, 178ss.

Hafner, G. (2000). Risks ensuing from the fragmentation of international law. *Yearbook of the International Law Commission,* part. B, 143.

Haggenmacher, P. (1986). La doctrine des deux éléments du droit coutumier dans la pratique de la Cour International. *Revue Général du Droit International Public, (90),* 5ss.

Hufbauer, G.C. et al., (2007). *Economic sanctions reconsidered*. Peterson Institute, Washington, D.C.

Jarvis, M. (2017). The practice of international criminal law. Some reflections from an ICTY Prosecutor. *International Criminal Law Review, 17 (3),* 400ss.

Kaczorowska-Ireland, I. (2015). *Public international law.* ed. Routledge, London & New York.

Kammerhofer, J. (2017). Sources in legal-positivist theories. In J. D'Aspremont, S. Besson, S. Knuchel (eds), *The Oxford handbook of the sources of international Law.* Oxford University Press, Oxford, 343 ss.

Kelly, J.P. (2000). The twilight of customary international law. *Vanderbilt Journal of International Law (40),* 450ss.

Kelly, J.P. (2008). International law and the shrinking space for domestic politics in developing countries. In P.E. Andrews, S. Bazilli, *Law and rights: Global perspectives on constitutionalism and governance*, Vandeplas, California, 262ss.

Kennedy, D. (2000). When renewal repeats: Thinking against the box. *New York Journal of International Law and Politics* (32), 358ss.

Kirgis, F.L. (1987). Custom on a sliding scale. *American Journal of International Law (81),* 148ss.

Klinzing, M.L. (2014). Denying reparation for slave and forced laborers in World War II and the ensuring humanitarian rights implications. A case study of the International Court of Justice's recent decision in jurisdictional immunities of the state (Germany v. Italy: Greece intervening). *Georgia Journal of International & Comparative Law, 41,* 80ss.

Kolb, R. (2003). Selected problems in the theory of customary international law. *Netherlands International Law Review (50),* 121ss.

Koskenniemi, M. (1990). The pull of mainstream. *Michigan Law Review (88),* 1946ss.

Koskenniemi, M. (1995-1996). The place of law in collective security. *Michigan Journal of International Law (17),* 455ss.

Krauthammer, C. (1991). The unipolar moment. *Foreign Affairs (70),* 25.

Kunoy, B. (2011). Establishment of the outer limits of the continental shelf: Is crossing boundaries trespassing?. *International Journal of Marine and Coastal Law, 26,* 316ss.

Law, M. (2018). The Chagos request: Does it herald a rejuvenation of the International Court of Justice’s advisory function. *Queen Mary Law Journal, 9,* 25.

Lepard, B.D. (2010). *Customary international law: A new theory with practical applications.* Cambridge University Press, Cambridge, 112.
Liakopoulos, D. (2020a). *The role of not party in the trial before the International Court of Justice.* ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020b). *Complicity of states in the international illicit*. ed. Maklu, Antwerp, Portland.
Lim, C.L. (2016). The strange vitality of custom in the international protection of contracts, property, and commerce. C.A. Bradley (eds), *Custom's future*. Cambridge University Press, Cambridge, 208ss.
Love, B. (2012). The International Court of Justice: Jurisdictional immunities of the state (Germany v. Italy: Greece intervening. Jurisdictional immunities of the state (Ger. v. IT. Greece intervening (ICJ). *International Legal Materials, 51 (3),* 564ss.
Magnùsson, B.M. (2015). *The continental shelf beyond 200 nautical miles.* ed. Brill & Martinus Nijhoff Publishers, Bruxelles, The Hague, 135ss.
Mendelson, M.H. (1999). *The formation of customary international law*. Recueil des Cours, ed. Brill, Bruxelles, vol. 272, 208ss.
Meron, T. (1989). *Human rights and humanitarian norms as customary law.* Oxford University Press, Oxford, 131.

Mettraux, G. (2005). *International crimes and the ad hoc tribunals*. Oxford University Press, Oxford, 20ss.

Murphy, J.F. (2012). *The evolving dimensions of international law*. Cambridge University Press, Cambridge, 34ss.

Murphy, S.D. (2014). Identifying the rules for identifying customary international law. *American Journal of International Law Unbound (108),* 172ss.

Nollkaemper, A. (2011). *Unilateralism/multilateralism.* Max Planck Encylopedia of Public International Law, para. 2 and 39-42.

Nolte, G. (2018). How to identify customary international law? On the final outcome of the work of the International Law Commission (2018), *KFG Working Paper Series, No. 37, Berlin Potsdam Research Group "The International Rule of Law- Rise or Decline?",* Berlin, June 2019.

Oude Elferink, AG. (2014). *The delimitation of the continental shelf between Denmark, Germany and the Netherlands.* Cambridge University Press, Cambridge, 34ss.

Oxman, B.H. (2014). Some observations on the draft conclusions on identification of customary law provisionally adopted by the ILC's drafting committee at the sixty-sixth session. *American Journal of International Law Unbound (108)*, 178ss.

Pauwelyn, J. (2012). Is it international law or not, and does it even matter?. In J. Pauwelyn, R.A. Wessel, J. Wouters (eds), *Informal international lawmaking*. Oxford University Press, Oxford, 125ss.

Pauwelyn, J. Wessel, R.A., Wouters, J. (2014). When structures become shackles: Stagnation and dynamics in international lawmaking. *European Journal of International Law (25),* 736ss.

Pauwelyn, J., Wessel, R.A., Wouters, J. (2012). *Informal international lawmaking.* Oxford University Press, Oxford.

Pellet, A. (2017). Unilateral sanctions and international law (Sèance Speciale, Memorandum). *Yearbook of Institute of International Law-vol. 76, Session of Tallin (Estonia, 2015),* Paris, 727ss.

Pellet, A. Müller, D. (2019). Article 38. In A. Zimmermann, C.J. Tams, K. Oellers-Frahm (eds), *The statute of the International Court of Justice: A commentary,* 3 ed., Oxford University Press, Oxford, 822ss.

Peters, A. (2017). The refinement of international law: From fragmentation to regime interaction and politicization. *European Journal of International Law (15),* 678ss.

Petersen, N. (2007). Customary law without custom? Rules, principles, and the role of state practice in international norm creation. *American University International Law Review (23),* 308ss.

Petersmann, E.U. (2016). Transatlantic Free Trade Agreements: Lack of EU leadership for reforming trade and investment law?. *Revue Internationale de Droit Économique (30),* 456ss.

Pigrau Solè, A. (2018). El caso de las Islas Marshall: Colonialismo, armas nucleares y justicia ambiental. *Anuario Español de Derecho Internacional, 34,* 444ss.

Reisman, W.M. (2000). Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention. *The European Journal of International Law (11),* 3ss.

Roberts, A. (2001). Traditional and modern approaches to customary international law: A reconciliation. *American Journal of International Law (95),* 759ss.

Ruiter, D.W.P., Wessel, R.A. (2012). The legal nature of informal international law: A legal theoretical exercise. In J. Pauwelyn, R.A. Wessel, J. Wouters (eds). *Informal international lawmaking*. Oxford University Press, Oxford, 162ss.

Rylatt, J.W. (2013). Provisional measures and the authority of the International Court of Justice: Sovereignty vs. efficiency. *Leeds Journal of Law & Criminology, 1,* 48ss.

Ryngaert, C., Wouters, J. (2009). Impact on the process of the formation of customary international law. In T. Kamminga, M. Sceinin, *The impact of human rights law on general international*

law. Oxford University Press, Oxford, 115ss.
Saganek, P. (2015). *Unilateral acts of states in public international law.* ed. Brill & Martinus Nijhoff Poublishers, Leiden, Boston.
Sands, P. (2000). "Unilateralism", values, and international law. *European Journal of International Law (11),* 293.
Sarmineto Lamus, A. (2013). Revocation and modification of provisional measures orders in the International Court of Justice: The Court's order regarding certain activities carried out by Nicaragua in the border area and the case concerning construction of a road in Costa Rican along the San Juan River joint proceedings. *The Law and Practice of International Courts and Tribunals, 12(3),* 463ss.
Schachter, O. (1982). *International law in theory and practice.* Recueil des Cours, ed. Brill, Bruxelles, vol. 178, 334ss.
Scharf, M.P. (2013). *Customary international law in times of fundamental change: Recognizing grotian moments.* Cambridge University Press, Cambridge.
Scoville, R.M. (2016). Finding customary international law. *Iowa Law Review, 101,* 1897ss.
Senti, R. (2014). Regional Trade Agreements: "Stepping stones" or "stumbling blocks" of the WTO?. In M. Cremona et al. (eds). *Reflections on the constitutionalisation of international economic*

law: Liber Amicorum for Ernst-Ulrich Petersmann, Martinus Nijhoff Publishers, Leiden, 442ss.
Shaffer, G.C., Pollack, M.A. (2010). Hard vs. soft law: Alternatives, complements, and antagonists in international governance. *Minnesota Law Review (94),* 708ss.
Simma, B. (1994). *From bilateralism to community interests in international law.* Recueil des Cours, ed. Brill, Bruxelles, vol. 250, 323.
Simma, B., Alston, P. (1989). The sources of human rights law: Custom, jus cogens, and general principles. *Australian Yearbook of International Law (5),* 89ss.
Snoxell, D. (2018). The politics of Chagos: Part played by Parliament and the courts towards resolving the Chagos tragedy. In S. Allen, C. Monaghan (eds). *Fifty years of the British Indian Ocean territory. Legal perspectives.* ed. Springer, Berlin, 360ss.
Sobenes Obregon, E., Samson, B. (2017). *Nicaragua before the International Court of Justice: Impacts on international law.* ed. Springer, Berlin.
Swaine, W.T. (2014). Identifying customary international law: First thoughts on the ILC's first steps. *American Journal of International Law Unbound (108),* 188ss.
Talmon, S. (2016). Objections not possessing an "exclusively preliminary character" in the South China sea arbitration. *Journal*

of Territorial and Maritime Studies, 88, 106ss.
Talmon, S. (2019). The United States under president Trump: Gravedigger of international law. *Chinese Journal of International Law (18),* 645.
Tams, J. (2010). *Enforcing obligations erga omnes in international law.* Cambridge University Press, Cambridge.
Tan, Y. (2021). *The Rome statute as evidence of customary international law,* ed. Brill, Bruxelles.
Tasioulas, J. (2007). Customary international law and the quest for global justice. In A. Perreau-Saussine, J.B. Murphy (eds), *The nature of customary law: Legal, historical and philosophical perspectives.* Cambridge University Press, Cambridge, 307ss.
Tesòn, F. (1998). *A philosophy of international law.* ed. Routledge, London & New York, 90ss.
Tesòn, F. (1998). Two mistakes about democracy. *Annual Proceedings of the ASIL (92)*, 127.
Thirlway, H. (2019). *The sources of international law.* Oxford University Press, Oxford.
Thouvenin, J.M. (2019). Questioning the Future of Multilateralism. *Proceedings of the ASIL Meeting (112)*, 332ss.
Tomuschat, C. (1994). *Obligations arising for states without or against their will.* Recueil des cours, ed. Brill, Bruxelles, vol. 241, 201ss.

Trachtman, J.P. (2013). *The future of international law. Global government.* Cambridge University Press, Cambridge, 10ss.
Trachtman, J.P. (2016). The growing obsolescence of customary international law. In C.A. Bradley (eds). *Custom's future.* Cambridge University Press, Cambridge, 172.
Trapp, K.N., Mills, A. (2012). Smooth runs the water where the brook is deep: The obscured complexities of Germany v. Italy. *Cambridge Journal of International and Comparative Law, 1,* 156ss.
Tuerk, H. (2012). *Reflections on the contemporary law of the sea.* Martinus Nijhoff Publishers, The Hague.
Vagts, D.F. (2004). International relations looks at customary international law: A traditionalist's defence. *European Journal of International Law (15),* 1033.
Van Den Herik, L. (2016). The decline of customary international law as a source of international criminal law. In C.A. Bradley (eds.). *Custom's future.* Cambridge University Press, Cambridge, 232ss.
Van Der Wilt, H. (2019). State practice as element of customary international law: A white knight in international criminal law. *International Criminal Law Review (19),* 4ss.
Verdross, A. (1969). Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts. *Zeitschrift für*

ausländisches öffentliches Recht und Völkerrecht (29), 638.
Weil, P. (1983). Towards relativity in international law?. *American Journal of International Law (77),* 414ss.
Weiler, J.H.H. (2012). *The WTO: Already the promised land?. In A. Cassese (eds), Realizing utopia: The future of international law.* Oxford University Press, Oxford, 418ss.
Wood, M., Sender, O. (2017). State practice. *Max Planck Encyclopedia of Public International Law.*

Complicity of states, role of international organizations under Art. 58 DARIO

DOI:10.5281/zenodo.10572489

Briane King, Post PhD, Legal adviser, U.S

Introduction[100]

The survey of this paper is the complicity of the state in the offense committed by an international organization in the exercise of its regulatory function. The framework in which the case in question unfolds logically presupposes that the complicit state is part of the agreement of the body which is the author of the main conduct.

In the first place we will carry out the examination of a question that takes on a preliminary character with respect to the one we intend to address in the following pages. This is the possibility that the main crime is supplemented by a regulatory act.

[100]I would like to thank the anonymous reviewers and especially prof. Liakopoulos for their helpful comments on an earlier draft of my paper.

Secondly, we will examine the conditions under which the concurrence in the resolution of a third degree legislative act must be qualified in terms of complicity pursuant to Art. 58 DARIO[101].
We will examine the way in which Art. 58 DARIO in the hypothesis of conduct held by the states within the UN Security Council. For the purposes of our analysis, the decision adopted by this body based on Art. 41 of the Statute of the organization can be taken as a useful model for the reconstruction of some general criteria. First of all, these are normative acts that can fly the international obligations that are incumbent on the organization. Furthermore, in the panorama of international organizations, is very common to find a body with a limited composition to which the Member States have delegated the exercise of certain functions. There is also another aspect of a structural nature which suggests taking the advice, for example, of a body in which the case of complicity can be integrated into art. 58 (Liakopoulos, 2020). Some members benefit from a differentiated legal position which in our opinion can constitute a valid prerequisite for

[101]ILC, Draft articles on the responsibility of international organizations with commentaries thereto, adopted on second reading at its 63rd session, August 2011, UN Doc. A/66/10, in Yearbook of International Law Commission, 2011, vol. II, par. II. Nel 2009, the ILC gas approved the project during the first reading. See Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009), UN Doc. A/64/10.

assigning these states of responsibility as a competition with the international organization.

Configurability of the unlawful act by regulatory norm

The qualification of a datum made as an illicit depends on the norm establishing the international obligation, so that depending on the content of obligation. The violation of this will can be constituted by the conduct of a legislative, an administrative or a judicial body. In our opinion it is necessary to move from this premise to the assessment of responsibility of international organizations for regulatory acts. From International Law Commission's (ILC) codification works, it can easily be deduced that under certain conditions the responsibility of an international organization may arise as a result of a regulatory act having binding effect in contrast with an obligation of the entity itself (Wengler, 1952; Virally 1974; Butkiewitcz, 1981-1982; Perez Gonzalez, 1988, Dominicè, 2005; Reinisch, 2007; Klein, 2010, Petiteville, 2021). The following considerations apply.

In the first place, the principle for which the conduct of any administrative or judicial legislative body is suitable for engaging the international state responsibility is now widely accepted (Ago, 1963; Von Münch, 1963). In his third report, rapporteur Ago, had

proposed a provision specifically defining this principle (Ago, 1971)[102], which was then merged without particular modifications, in art. 6 of the project of articles on state responsibility that is approved in (first reading) 1996. The aforementioned rule established that: "The conduct of an organ of the state shall be considered to the constituent, legislative judicial or other power (...)"[103]. It should be emphasized that International Court of Justice (ICJ) in the advisory opinion of the Commission on human rights found that the rule under examination was of a customary nature (Zimmermann, Tams, Oellers-Fraham, 2019)[104]. This is a provision that is also located in the draft articles approved in

[102]"article 6: Irrelevance of the position of an organ of the State in the distribution of powers and internal hierarchy. For the purposes of determining whether the conduct of an organ of the state is an act of the state in international law, the questions whether that organ belongs to the constituent legislative, judicial or other power, whether its functions are of an international law an internal character and whether it holds a superior or a subordinate position in the hierarchy of the state, are irrelevant (...)".

[103]Yearbook of International Law Commission, vol. II, p. 193.

[104]ICJ, Difference relating to immunity from legal process of a special rapporteur of the commission on human rights, advisory opinion 29 April 1999, par. 65). op. cit., p. 29, par. 62. Orientations which is affirmed also in the case: Application of the convention on the prevention and punishment of the crime of genocide, preliminary objections, judgment of 11 July 1996, ICJ Reports 1996, p. 202, par. 385.

second reading in 2001. According to art. 4, par. 1: "(…) the conditional of any state organ is considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions (...)"[105].

What is highlighted in the briefly illustrated provisions is the question of imputability of the conduct carried out by legislative state bodies. This is a principle acquired so much that in the codification process it did not have to be listed among the motivated norms in terms of the progressive development of international law. The principle of unity of the state with respect to international order constitutes the shared basis on which even the most recent doctrine has argued (Borchard, 1914; Eagleton, 1928, Verdross, 1929; Dahm, 1961; Ago, 1971)[106], in the assumption that

[105]ARSIWA, par. 40 (International Law Commission (ILC), Draft articles on responsibility of states for intentionally wrongful acts, with commentaries, 2001, UN Doc. A/56/10, in Yearbook of International Law Commission, 2001, vol. II, part two, p. 31ss).

[106]In particular the reference to the codification Conference of 1930 that established in art. 6 of the resolution that state responsibility may well arise as a result of commissions or omissions of the legislative power. In this sense, the internal practice that the material limits of the present work do not describe in detail is also evident. There are some cases that deserve to be quickly mentioned. See for example from the ECtHR. Dudgeon v. United Kingdom of 22 October 1981, par. 41, in which the ECtHR considered that the mere validity of legislation incompatible with the ECHR in itself

the internal normative acts are mere facts before international law, made them relevant when the order contained in them is such as to require the state to behave contrary to its international obligations (De Visscher, 1924). It is also hardly necessary to point out the thesis (Hoijer, 1930) which excluded this form of responsibility due to the sovereign character of the legislative activity, since this characteristic is no longer sustainable.

Once is established that under the subjective profile the legislative act is attributable to the state, it must then be verified whether the conduct objectively establishes the violation of an international obligation. It is the provision that establishes the obligation to establish whether the legislative act constitutes a violation, so that for example the obligation for a state to issue certain rules in its internal system is violated by the omission of the tax activity[107]. If

incorporated the responsibility of the respondent state regardless of its unlawful application.

[107]The internal law may constitute in certain circumstances an international illicit. In this perspective, in addition to the damage, there is also the element of guilt, considering that the legislative act integrates an offense only if you are negligent or if the national legislator has not taken into due consideration those elements of fact which should have been taken into account. That the analysis of liability by legislative act must take into account the nature of the violated obligation also results from the distinction between norms that impose a specific conduct and rules that oblige the achievement of a certain result distinction that the doctor had already correctly set in his general terms.

this last consideration is well founded, it must be assumed that the examination relating to any illegal act deriving from a legislative one must be carried out on a case by case basis due to the nature of the violated obligation, as is not necessary for the actual execution of the act in question[108].

In a second place, assuming third-degree sources in the same way as normative acts does not mean ignoring the differences between international and legislative acts of domestic law. What is relevant in our perspective is the common regulation of the acts in question. The very notion of normative act implies the concurrence of a double structural element. It must be a juridical act with the exclusion of mere legal facts. Secondly, the content of

---

What comes to the fore is that the content of the law is inherently illegitimate since in the case in which on the basis of an internally unimpeachable law were issued acts contrary to illicit international obligations would be the acts of emanation and not the law itself.

[108]The mere emanation of a state regulation in itself contrary to the international obligations of the state is not sufficient to integrate an illegal place that the state exercises its power at the time of coercion or when coercion is likely or imminent rather than through the mere emanation of a law that does not have or does not have a gap or possibility of being applied in practice. If it is true that the international offense is perfected in most cases only with the execution of the law it is necessary that the injured state is used to raise protests or complaints from the moment of the approval of a law which, if executed it would produce unjust harm to them.

the act must be classifiable as normative, consisting of one or more provisions suitable to act as rules of conduct in the life of a relationship. The first of the two structural elements mentioned above is widely known in the international order between the various subjective juridical acts. There are some that rise to the category of juridical acts because of the role that the subject of the will assumes in them. In this regard it is hardly necessary to point out that for our purposes the requirement of subjective imputation is satisfied by the circumstance assumed by way of a logical premise that the organizations in question are subject to international law. As for the second of the two elements, it has already been observed that some functional bodies are authorized to carry out regulatory activities which give rise to third-degree sources.

These are expressions of will of the subjects of the legal system in which the competence to dictate rules of behaviour by means of deeds is recognized. Thus the law is the prototype of the normative act and it is completely irrelevant if we consider it necessary. In the general theory of law the extension of the notion of normative act to those of the international order is authoritatively accepted, whose sources pose autonomous rules and commands rather than heteronomous inter or even super partes. Hard core in our opinion is the effect produced by the

normative act, whether internal or international. Each in the context of his own legal system and in compliance with his own forms of regulatory production is able to innovate the legal situations of the respective subjects, resulting in a change in existing legal conditions. Within the international order the third degree sources are able to innovate Member States' juridical position on the basis of the will expressed by them by means of the establishing agreement.
In light of these considerations, we must understand the analogy with the normative acts of domestic law, not wanting to assert that international organizations are endowed with legislative powers. These are capable of affecting the juridical situation of individuals who in our perspective are subjects of a different ordering and distinct from the international one.

(Follows) Responsibility of an international organization resulting from a third degree source

A further evaluation is indispensable, which we believe strongly argues in favor of the considerations briefly traced concerning the responsibility of functional bodies for deliberative activities. In terms of imputation, Art. 4 DARIO undoubtedly allows to configure the normative acts in the same way as conduct, in

principle referable to a functional entity. This rule must then be coordinated with art. 17, par. 1 that in our opinion is consistent with the entire international liability regime establishing that an international organization: “Incurs international responsibility if it circumvents one of its international obligations by adopting a binding decision to Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization” (Liakopoulos, 2020).
Par. 3 of the same provision clarifies that the aforementioned law is applicable “whether or not the act in question is internationally wrongful for Member States or international organizations to which the decision (…) is addressed”[109]. As is evident from the literal side of art. 17 distinguishes expressis verbis the hypothesis of a binding act (decision) from that of an act with authorization and non-binding content regulated instead by par. 2 of the same article. The assumption of the rule in question is well summarized in the words of the Austrian delegate to the VI Committee of the UN General Assembly for which international organizations cannot evade the rules on responsibility “by outsourcing its actors”[110]. In the shared assumption of ILC[111] and Gaja[112] the

[109]DARIO, pp. 40-43.
[110]UN Doc. A/C.6/59/SR.22, par. 24.
[111]DARIO, p. 40, par. 5.
[112]G. Gaja, Third report on responsibility of international organizations, UN

execution of decisions by Member States does not raise the organization from the responsibility for the illicit that derives from it. But what we want to highlight for the purposes of our analysis is that this responsibility arises independently from the actual execution of the act by the states they are addressed to. The general tenor of art. 17, par. 1 indeed "does not stipulate as a precondition, for the international responsibility of an international organization to arise that the required act be committed by Member States"[113]. Therefore, the execution of the decision by these states would then be high"[114]. According to ILC regulations, the organization's responsibility is determined in similar circumstances due to the mere fact of having adopted the decision, a circumstance that legitimizes "the third party that would be injured to seek a remedy even before the act is committed (...)" (Nedelski, Nollakemper, 2012).

The criterion with which to evaluate the actual occurrence of the case described in par. 1 of art. 17 consists of the margin of discretion available to states in the fulfillment of what is imposed by the decision of an international organization. The parameter in question also emerges as a criterion for assessing Member States responsibility which, in order to carry out a third degree source,

Doc. A/CN.4/553, 2003, pp. 16, par. 36.

[113]DARIO, par. 41.

[114]DARIO, par. 41.

put violations on the obligations incumbent on them thanks to general international or contractual law. Here it must be emphasized that if the deed contains a command determined in all its elements and therefore does not leave to its addressees no margin of discretion either with regard to whether, when or how its execution[115] and contextually is contrary to an international obligation of the institution that approved it[116]. Gaja specifies that in the hypothesis of the institution in question the states have a certain degree of discretion, since the responsibility of the organization that has deliberated the act cannot be invoked (Tzanakopoulos, 2011; Voulgaris, 2014)[117].

Consequently, a decision that requires states to behave in a specific way in order to fulfill the obligations contained in it entails an international unlawful act of the organization that adopted it regardless of its actual execution. In such circumstances

[115]DARIO, p. 41.

[116]G. Gaja, Third report on responsibility of international organizations, op. cit., p. 12, par. 30.

[117]It must be emphasized that this criterion differs from the traditional canon of factual control, precisely from art. 17 ARSIWA that the same project of 2011 assumes as criterion of attribution of responsibility in art. 15 (and in art. 59). In this case, centered on regulatory control, it is not required that the fact be unlawful even for the controlled party. It is integrated regardless of the existence of the subjective element of the organization that exercises the control in question.

the organization exercises a regulatory control (Tzanakopoulos, 2011), on its Member States, which would give rise to a form of indirect responsibility in the case of the same entity (Voulgaris, 2014). That the absence of discretion for the members implies the imputation of conduct to the deliberating organization is a datum now widely acquired by the doctrine (Ritter, 1961; Gaja, 1988; Hirsch, 1995; Klein, 1998; Frank, 1999; Tzanakopoulos, 2011; Voulgaris, 2014) and consolidated in practice.

In this last profile, it should be noted that in the well-known Court of Justice of the European Union (CJEU), C-175/84, Krohn v. The European Commission case of 26 February 1986[118], CJEU in that

[118]CJEU, C-175/84, Krohn v. European Commission of 26 February 1986, ECLI:EU:C:1986:85, I-00753. It was an action of non-contractual liability brought by a German company Krohn & Co. Import/Export for the prejudice suffered following the refusal by the Bundesanstalt für Landwirtschaftliche Marktordnung (BALM) of Frankfurt to implement a Commission regulation, to issue to that company certain import licenses. The problem of imputation was underlined in the same way as a preliminary question, given that the jurisdiction of the Community judge with regard to actions involving non-contractual liability exists only if the damage was caused by an institution of the Union. If, on the other hand, the damage was caused by the state authorities, even if due to the application of a Community act, the jurisdiction falls to the national Court. In the same spirit see also the case: C-101/78, Granaria v. H. v. A., of 13 February 1979, ECLI:EU:C:1979:38, I-00623, par. 13-14.

time after having ascertained that the nature of the Community act executed by the German authorities was such as not to leave them any margin of maneuver. It concluded that the unlawful act enclosed by the applicant in support of its right the compensation is attributable not to the BALM, which was required to comply with the Commission's instructions, but precisely to the latter. That is because of the criterion indicated the same CJEU had reached a conclusion of opposite sign C-133/79, Ducrimez and Westzucker v. Commission case of 27 March 1980[119], where the Luxembourg judge rejected the claims for damages since the alleged injury had been put in place by the national authorities in execution of the non-binding act of the Commission. An orientation of a third degree source can also be found in the well-known C-184/95, Dorsch Consult v. Council case of 28 April 1998 (Lenaerts, Maselis, Gutman, 2014; Derlèn, Lindholm, 2018; Bouveresse, Ritleng, 2018; Clêment-Wilz, 2019; Del Pozo, Francisco, 2020; Lenaerts, Gutierrrez Fons, 2020)[120]. The general Court given the appeal to annul the Regulation n. 2340/1990 adopted for the purpose of implementing the Resolution no.

[119]CJEU, C-133/79, Ducrimez and Westzucker v. Commission of 27 March 1980, ECLI:EU:C:1980:104, I-01299, parrr. 13-25. C-217/81, Interagra SA v. Commission of 10 June 1982,ECLI:EU:C:1982:222, I-02233, parr. 7-11.

[120]CJEU, C-184/95, Dorsch Consult v. Council of 28 April 1998, ECLI:EU:C:1998:74, I-00667.

661/1990 of the UN Security Council held that the damage complained of by the appellant should be considered attributable to this Resolution, whose content imposed precisely the conduct object of the complaint. Similar reasoning can be found in the well-known Kadi and Yusuf sentence of 21 September 2005 in which the EU Council implemented the Resolution no. 1267/1999 of the UN Security Council. The judgments under consideration together with the second degree sentence of the CJEU (Kadi and Yusuf judgment) have raised some substantive legal issues extensively explored by the doctrine (Cannizzaro, 2006; Rideau, Balmond, Arcari, 2010) that cannot be explored in this context. It should only be emphasized that the general Court has enhanced the circumstance for which, by adopting the contested regulation, the Community institutions had acted on the basis of a bounded competence having no margin of discretion as regards the execution of the measures imposed by the aforementioned resolution. On the contrary, where the same Court has recognized the existence of discretion, was finally reached a different solution. In T-282/02, Organization des modjahedines du peule d'Iran v. Council sentence of 12 December 2006 has partially accepted the applicants' arguments, believing in part that the present case was different from the previous Yusuf and kadi decision for a decisive reason. In these proceedings a community

act was contested which constituted the exercise of binding powers on the part of EU Council, which had confined itself to transposing the measures imposed by Security Council into Community law. On the contrary, in the Organization des Modjahedines case the conduct of EU Council constituting the exercise of its own power, even if finalized to the fulfillment of an obligation of result imposed by a Resolution of the Security Council exposed itself to the Union judge in the same way as do EU law (Leinarte, 2021).

Even some pronunciations by European Court of Human Rights (ECtHR) seem relevant to the profile examined here. It appears to be significant the Nada v. Switzerland case of 12 September 2012. The normative act although at the origin of the grievance was the same that had given rise to the Kadi case, i.e. Resolution n. 1267/1999. ECtHR has accepted the appeal based on the topic for which the state "enjoyed some latitude which was admittedly limited but nevertheless real, in implementing the relevant Resolution of the UN Security Council" (Voulgaris, 2014). Regardless of the criticism that can be addressed to this reasoning, the centrality seems to be the Al Dulimi v. Switzerland case of 26 June 2016. ECtHR attributes decisive importance to the topic for which Resolution no. 1483/2003 of Security Council (Kirgis,

2003)[121] at the origin of the state conduct object of the grievance "do not confer on the states concerned any discretion in the implementation of the obligations arising there (…)" (Kirgis, 2003).

The responsibility of an international organization for legislation from art. 17 of the 2011 project follows the approach for which the normative act abstractly contrary to international law is not sufficient to integrate the responsibility of the subject that adopted it in the absence of its concrete application. This rule governs the responsibility of an organization that authorizes Member States to perform an act "that would be internationally wrongful if committed by that organization" (Liakopoulos., 2020) but subordinates the arising of this responsibility to the effective and concrete execution of what is authorized.

[121] S/RES71483 (2003), 22 May 2003, par. 23.

Participation in the deliberative procedure as an hypothesis of complicity. The need to "isolate" state behaviour from the outcome of the procedure

Given the conditions under which a legislative act is suitable to integrate the responsibility of an international organization, is necessary to dwell on the possible involvement of Member States with respect to the categories of conduct examined. It is a matter of assessing the circumstances under which the behaviour of Member States is able to carry out the case of complicity in relation to the main crime constituted by the regulatory act of the functional entity itself. To this end, it must be emphasized that the conduct of individual members is susceptible to a separate assessment with respect to that relating to the regulatory act that they contribute to determine.

As noted by PCIJ in the advisory opinion of 1925 on Art. 3, par. 2 of the Treaty of Lausanne (Söfker, 2014)[122] the delegates within the organ of an international organization commit the responsibility of the respective states. The conduct held by a

[122]CPIJ, Consultative opinion of 21 November 1925 relative to art. 3, par. 2 of the treaty of Lausanne (Frontier between Turkey and Iraq) in collection of advisory opinions, series B-N 12, p. 29, where the UN Council "is composed of representatives of members that is to say of persons delegated by their respective governments, from whom they receive instructions and whose responsibility they engage (...)".

delegate within an organ is always attributable to the state on whose behalf it acts without prejudice to the fact that the decision is attributed to the organization. Useful indications can be obtained from the judgment of 5 December 2011 by which the ICJ ascertained the responsibility of Greece for having opposed NATO within the admission of the former Federal Republic of Macedonia (Zimmermann, Tams, Oellers-Fraham, 2019)[123]. In this case, the responsibility of the defendant state was based on the violation of an obligation imposed on it in the same way as the provisional agreement concluded between the parties on 13 September 1995. ICJ's ruling is inscribed in the complex framework of the dispute between former Yugoslav Republic of Macedonia (FYROM), on the one hand and Greece on the other concerning the use of the name Macedonia as part of the first state. During the NATO summit in Bucharest (2008), a decision was made not to invite the state actor to start preliminary negotiations on the admission to the organization, until "a mutually acceptable solution to the same issue" is reached[124]. How the ICJ has easily ascertained the conclusion reached in the course of the summit constituted a direct consequence of the Greek

[123]ICJ, Application of the interim accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), 2008-2011.

[124]Bucharest Summit Declaration issued by heads of states and governments participating in the Meeting of the North Atlantic Council on 3 April 2008.

facilitated pressures due to the particular nature of the admission procedure foreseen by the Treaty of Washington of 1949. The appeal of FYROM focused on the alleged violation by Greece of the obligation contained in Art. 11, par. 1 of provisional agreement not to oppose the admission of the former in international organizations of which the second phase was a member. ICJ accepted the appeal stating that Greece by obeying the admission of the former Republic of Macedonia to NATO has breached its obligation under article 11, par. 1 of the interim accord of 13 September 1995.

The case just mentioned is outside the scope of our investigation since the responsibility of Greece will not be integrated by participation in the offense of others but exclusively by the violation of the obligation pending on it to hold a certain behaviour within the decision-making body. It seems useful to us to dwell on the orientation adopted by ICJ with regard to certain issues that are relevant to our investigation. Firstly, it attributes to Greece the conduct it has held that such conduct can be assessed independently of NATO's decision. ICJ therefore rejected the Greek defense argument. It was not able to separate the position of the Greek delegate from the collective resolution adopted by the Atlantic Council. It raised that the object of Macedonian appeal concerned the alleged violation of an obligation incumbent

exclusively on the agreed state and not on NATO (Zimmermann, Tams, Oellers-Fraham, 2019)[125]. Secondly, and this is probably the decisive aspect for ICJ, the primary rule relevant in the present case established a specific duty of conduct suitable for imposing itself on Greece and binding its activity even when the latter found itself acting within the decision-making body of an international organization.

(Follows) The conditions set by Art. 58 DARIO to the complicity of states in the offense deriving from the legislative act

According to a first orientation, simple participation in the vote, although not decisive for the purpose of adopting the regulatory act, can commit the responsibility of Member State to complicity (Klein, 1998; Quian, 2006; Klein, 2010; Sarroshi, 2013; Katz Cogan, Hurd, Johnstone, 2016)[126]. In the opinion of another part of

[125]The ICJ assessed the Greek conduct legally independent of the content of the Resolution of the Atlantic Council with the precise indication that the rights and obligations of NATO and other Member States do not come to the fore in resolving the dispute in question, so the argument based on the principle of gold money is to be considered misplaced.

[126]Member States incur complicity when they facilitate the adoption of a normative act “that mandates the Commission of the internationally worn

the doctrine, this offense is produced only under “very special circumstances” (D’Aspremont, 2007), which occur if and to the extent that the state conduct has made it possible to the Commission of the unlawful act by the organization (Seidl-Hohenveeldern, 1987; Geslin, 2005)[127]. Otherwise it is observed, it would deny any allegiance to the distinct legal personality of the

act”. According to the author (Sarroshi) the participation in the decision-making process by a Member State exposes the latter to the attribution of responsibility due to the deliberative organization. This position is based on the assumption that the Member States exercise a form of control over the normative conduct of the institution. The jurisprudence expressed by the People's Republic of China within the VI Committee at the General Assembly during the discussions on DARIOs seems to be related to this orientation “since the decisions and actions of an international organization were, as a rule, under the control or reliant of the support of Member States, i.e. those Member States that voted in favour of the decision in question or implemented the relevant decision, recommendation or authorization should incur a corresponding international responsibility”, Sixth Committee, summary record of the 11th meeting, in GAOR 23 November 2005, Doc. A/C.60/SR.11, p. 10, par. 543.

[127]Seidl-Hohenveldern considers the responsibility of a Member State for the Organization's decisions “should depend on the fact whether or not the Member State, by participating in the decision of the Organization, would be able to prevent the adoption of the decision concerned”. In this perspective the provision contained in art. 12, par. 2 of the Charter of economic rights and duties of the states which imposes on the organization and the respective

organization that adopted the act. The solution accepted by Art. 58 DARIO is attributable to this orientation as can be seen from the letter of the provision and from the comment that the ILC itself provided. In ILC's opinion "(…) the possibility that aid or assistance could result from conduct taken by the state within the framework of the organization cannot be totally excluded (...)"[128].
In even clearer terms Gaja emphasized in his fourth report that the relevant conduct for the purposes of state complicity "could not simply consist in participating in the decision making process in the implicit assumption that participation in the vote may well be configured as an aid or assistance pursuant to art. 58"[129].
The configurability of the case in question is subject to the condition post from par. 2 in art. 28 based on which: "An act by a Member State of an international organization done in accordance with the rules of the Organization does not as such engage the international responsibility of that state under the terms of this article". It can be deduced that the physiological participation in the regulatory activity of the institution is in itself not suitable to impose the responsibility provided for by the same provision in

Member States "a duty to ensure that the policies of the organization concerned correspond to the provisions of this Charter (...)".

[128]DARIO, p. 91, par. 4.

[129]G. Gaja, Fourth report on responsibility of international organization, add. 1, UN Doc. A/CN.4/564/Add.1, p. 5, par. 62.

par. 1.
It seems possible to conclude that Member States' conduct within the framework of a third-degree regulatory procedure must qualify as an unlawful act of complicity only if is a necessary condition for the occurrence of the main crime (Klein, 2012). The causal link between accessory and main fact in the specific hypothesis assumes the form of conditionality having to verify from time to time if the damaging act could have been adopted without the favourable vote of the state in consideration. In the event of a positive response, it should be excluded the application of art. 58. The solution adopted by ILC and supported by the majority doctrine, takes into consideration both the nature of international organizations and the need to guarantee their normal and ordinary functioning. On the one hand, in the exercise of legislative activity, organizations' will is to varying degrees influenced by the will of individual Member States. For this reason the decision-making process that is established in organs with a state composition cannot reasonably be considered as originating, in the same way as the legislative procedure of a state. On the other hand, it is in the decision-making process that the existence of a will distinct from that of Member States is tested. In the situation contemplated by art. 58 the will and consequent normative activity of the organization is determined with the contribution of

that of Member State without for this reason the second overlaps or replaces the first one.

It has been argued that through par. 2 of Art. 58 DARIO, ILC would have set a cause of exclusion of the illegality different from those codified both in ARSIWA and DARIO constituted by the fulfillment of the internal rules to the organization to which the illegal regulatory act is attributed (Lanovoy, 2016). It seems that art. 50 requires an assessment of the complicity in the regulatory act by reason of the contribution that each state lends within the deliberating body, without excluding that the accessory fact comes into being even in situations that comply with the internal law of the functional body. In other words, even the institutional framework in which the main crime is produced can play a decisive role in assessing the circumstances of the case. It is undeniable that the nature of the body to which this offense is attributable together with the possibly differentiated position of some Member States with respect to others are elements that contribute to determining the contribution of each state with respect to the damaging act (Seidl-Hohenveldern, 1987)[130]. The

[130]Seidl-Hohenveldern references to art. 12, of the Charter of economic rights and duties of Members States that the liability regulated therein: "(…) should be determined in the light of the right given by constitution of the organization to the consent of the state concerned, when reaching such a decision (...)".

project itself expressly admits that “the size of membership and nature of involvement will probably be decisive”[131]. These observations make it possible to apply the provisions of art. 58 to the conduct held by some members of the Security Council with respect to the decisions taken by this body on the basis of Art. 41 of the Charter that are in contrast with the international UN obligations (Cortès Martin, 2008; Lanovoy, 2016). In addition to the weight in the decision-making process, other factors must also be taken into account, such as the role played by each member in the preparation of the resolution or in the organization of the procedure for its adoption.

It is necessary to add about the material element of complicity in the adoption of an illicit regulatory act that the same can be supplemented by an illegal behaviour in itself (Lanovoy, 2016). For example, consider the conduct of Member State which is in contrast with the general obligation of good faith in participating in the voting procedures (Fitmaurice, 1952; Kolb, 2000) or to the due diligence. According to ILC would require states to guarantee the lawfulness of decisions of the body of which they are members (Lanovoy, 2016). Likewise, the obligation for Member States of the Executive Board and Board of Executive Directors to ensure that IMF and World Bank's actions respectively produce

[131]DARIO, p. 91, par. 4.

effects incompatible with the rights enunciated by the International Covenant of Economic, Social and Cultural Rights (Barros, 2015)[132].

As for the subjective element of complicity, it is believed that its assessment is in most cases easy, given that in practice the voting procedures are always preceded by statements in which the Member States express the reasons for their determinations showing full awareness of the consequences of their vote (Lanovoy, 2016).

[132]The obligation in question is supplemented by way of example to indicate that certain categories of rules, including those of a contractual nature, may impose themselves on states acting in the framework of international organizations. The problem that arises with specific regard to international organizations that perform functions in economic and financial matters, such as typically the IMF and the World Bank seem prima facie to be outside the subject of our investigation. First of all because there is no unanimity of coming, for example, in the configuration of the activity carried out by these organizations as strictly normative in the sense seen in the introduction to part II of this work. Secondly, because even to admit its normative character there is more than one doubt about the nature of the act with which, for example, the financial assistance takes place, given that some consider it a unilateral act and others as an agreement with the international state. We can consider that, at least with regard to the world bank, state support activities normally take place following the conclusion of an agreement with the Organization. In such situations, a first degree of complicity could be posed in the first approximation to that developed in this work. We refer to the possibility of examining the activity of this organization in the offense committed by states.

(Follows) States' participation in UN illicit

The hypothesis of states complicity in the regulatory act of the Security Council assumes that it cannot be the object of further study in this place for which a decision of this body is likely to violate the parameters that regulate the UN activity determining thus the international responsibility (Dowhering, 1997; Oosthuizen, 1999; Reinisch, 2001; Dominicè, 2013).

The involvement of Member States with respect to a harmful act put in place by the Security Council must be evaluated according to the particular nature of this body. Art. 58 DARIO attributes a decisive role to the characteristics of the organ and type of membership in determining the complicity of states in the act of the body in question. We have also seen that Art. 58, par. 2 (Liakopoulos, 2020) establishes as a general rule that the activity normally exercised by states within the framework of the organs does not in itself apply to integrate the case of complicity but at the same time clarifies that in some borderline cases[133], state involvement can give rise to illicit complicity with respect to an act attributable to the organization. In these cases it can be easy to verify the actual contribution given by the individual Member State with respect to the main crime. The UN Security Council

[133]DARIO, p. 91, par. 4.

seems in our opinion to be among the borderline cases generically reported by ILC.

First of all, we specify that the composition of the Security Council based on Art. 23 of the Charter presented a restricted membership with a differentiated legal position for the benefit of permanent members. This is a widely known aspect on which therefore it does not seem necessary to dwell. What is important to highlight is that the exercise of veto by art. 27 places permanent members to prevent the adoption of acts that prima facie are in contrast with the international UN obligations. The material element in this case would be constituted by an omissive conduct whose normative basis should be sought in the positive obligation of members to ensure that the decisions of the body do not conflict with international law. Furthermore, the negative vote of permanent members against the revocation of sanctions adopted pursuant to art. 41 of which the incompatibility with the regulatory parameters limiting the action of the Council is proven, is an accessory fact of a Commission type. It should be noted that even the mere threat of the use of the right of veto can take the form of illicit assistance in the same way as art. 58 on the responsibility of the organizations that it comes within the same Council. The fact is that this behaviour is in itself completely lawful because is allowed in Art. 27 of the Charter. The forms of

legal assistance do not to present any profile of opposition with respect to the obligations of the accomplice. Rather, the lawfulness of the behaviour in question, that is the exercise or threat of exercising the right of veto, serves as a descriptive criterion that excludes that this conduct reintegrates the case of management and control over organization's crime (D'Aspremont, 2007)[134]. If it is true that the exercise of the right of veto by a permanent member of the Security Council constitutes a lawful measure and as such does not represent a valid title of concurrent responsibility in the head of said state (D'Aspremont, 2007), it cannot be excluded that this hypothesis will constitutes illegal assistance pursuant to art. 58 (Peters, 2012)[135].

[134]The case of management and control that would give rise to a joint and concurrent responsibility would be supplemented by an overwhelming control exercised by some Member States on the decision-making process of the body of which they are part. The latest unspecified statement would occur only in the presence of forms of pressure not envisaged by the trust act of the entity in question.

[135] It should be noted that the exercise of the power of veto can be considered an abuse of rights at least to the extent that the thesis in the exercise of the rights deriving from the membership of the bodies of the UN is considered by each Member State "legally bound to the principle of good faith, to give effect to the purposes and principles of the UN and to act in such a manner as not to involve any breach of the Charter". Dissenting opinion of judges Basdevant, Winiarski, Sir Arnol McNair and Read, Conditions of admission

Secondly, in the cases where the decision or the absence of a decision should be in contrast with erga omnes obligations, Security Council Member States' conduct should, in our opinion, be assessed in the light of Art. 58 and 42, par. 1 DARIO. Permanent members who are made aware of the circumstances and consequences of a legislative act on erga omnes obligations should work to prevent the adoption of the same act. If the violation has already occurred and continues over time, the further obligation imposed by Art. 42, par. 1 DARIO by virtue of which all Member States of the Security Council and, a fortiori, permanent ones must prepare all lawful measures in order to put an end to "a serious breach of obligation arising under a peremptory norm of general international law". The aforementioned provision is highlighted in particular in the hypothesis that a decision in contrast is maintained as obligations

of a state to membership in the UN (article 4 of the charter), advisory opinion, 28 May 1948, ICJ Reports, 1948, p. 57Ss, par. 21. According to Peters this circumstance occurs where the Security Council does not endeavour to face the serious violation of human rights, violating the rule that according to this perspective would be imposed by the responsibility to protect. Precisely leveraging the comment on art. 58 of the project on the responsibility of international organizations, the author states that: "The boundary line between lawful participation in the Security Council's decision making on the one hand and the assistance (or control) amounting to an unlawful act seems to be overstepped in cases of an abuse of the veto (...)".

of the type considered. Art. 42, par. 1 in the hypothesis under examination imposes on each of the 15 Member States the obligation already noted by the doctrine a basis for partially different assessments to bring to the attention of the Security Council the situation detected (Doehring, 1997)[136] and above all to activate within this body in order to induce him to revoke the unlawful decision by resorting more precisely to the instruments permitted by the Charter and rules of procedure. It must be assumed that otherwise state responsibility will result in the violation of the obligation of cooperation enshrined in Art. 42, par. DARIO.

It seems clear that the five permanent members constitute the prototype of states with respect to those the obligation of cooperation assumes in the words of Gaja, the content of a stricter duty, as they can make a decisive contribution in the indicated perspective. It must therefore be concluded that in the hypothesis envisaged the exercise of the right of veto by the permanent members intact through the abuse of law that the doctrine links to other cases a violation of Art. 42, par. DARIO.

The practice in this regard is very small. Nevertheless, we must cite a case often referred to in the doctrine that supports the thesis

[136]Stating that the author (Doehring) links the obligation to inform the Security Council of the right of all UN Member States not to apply a resolution contrary to jus cogens.

of complicity in the context of deliberative activities (Klein, 2010; Klein, 2012). This is the conduct held by the permanent members of the Security Council and in particular from United Kingdom, i.e. the framework of the sanctioning measures against the former Yugoslavia in the early nineties of the last century. We refer to the Resolution n. 713 of 25 September 1991 (Papastavridis, 2007; Seaman, 2016; Olalekan Yussuf, 2018) with which the Security Council imposed an arms embargo and resolutions n. 757 of 30 May 1992 (Van Herik, 2017; Higgins, Webb, Akande, Sloan, Sivakumaran, 2017) and n. 787 of the following 16 November with which a trade embargo was decreed (Van Herik, 2017; Higgins, Webb, Akande, Sloan, Sivakumaran, 2017).

Resolution n. 713 which forbade the transfer of arms to the Federal Republic of Yugoslavia would have substantially deprived Bosnia of its right to legitimate defense protected by art. 51, UN Charter (Higgins, Webb, Akande, Sloan, Sivakumaran, 2017). The organization of Islamic countries, in that circumstance, declared the illegitimacy of the Resolution specifying that the Member States would not have fulfilled the additional obligations deriving by the decision[137]. It should be noted that the General Assembly

[137]See the following resolutions of the conference of foreign ministers: Res. 6/22-P (10-12 December 1994), par. 7; res. 7721-P (25-29 April 1993), res. 6723 P (9-12 December 1995), parr. 12-15. See also the OIC Heads of state and government declaration on Bosnia and Herzegovina, 7th Islamic summit

recommended to the Security Council: "(...) to exempt the Republic of Bosnia and Herzegovina from the embargo imposed on the Former Yugoslavia under Security Council Resolution 713"[138], sharing in such a situation the need to guarantee to Bosnia the availability of the military means necessary to exercise the legitimate defense even if in principle it affirmed the exclusive competence of the Security Council in order to revoke the sanctioning measures (Orakhelashvili, 2006)[139]. Regarding the legal consequences of Resolution no. 713 is worth remembering the position expressed by the judge Lauterpacht during the proceeding brought by Bosnia against Serbia concerning the alleged violations of the 1993 genocide Convention. After having noticed that a decision of the Security Council is able to put itself

conference, 13-15 December 1994.

[138]Res. 47/121 (1992).

[139]Orakhelashvili affirms that the rigid distinction between primary and secondary norms meets essentially theoretical-descriptive requirements. Every rule of the international order is according to this thesis "free standing and full fledged". All the rules are created, modified or extinguished. In the same way are subject to the same implementation mechanism and above all "undergo the same process of interaction with other legal norms as manifested by the cases of defences, derogation and reciprocal non compliance". In this sense, each secondary standard is at the same time "a substantive norm, a rule of substance, an embodying the substantive rights and obligations under international law" (p. 80).

in contrast with the cogent right. Judge Lauterpacht believed that he could see a violation of the prohibition of genocide in the Resolution. More precisely, according to this opinion, the material impossibility for Bosnia "to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo". So that having prevented Bosnia from exercising its right to legitimate defense Resolution no. 713 would have imposed on UN Member States "to become in some degree supporters of the genocidal activity of Serbs and in this manner and to that extent to act contrary to a rule of jus cogens" (Zimmernamm, Tams, Oellers-Fraham, 2019)[140].

Bosnia and Herzegovina announced its intention to institute contentious proceedings before the ICJ against UK on 15 November 1993: "for violating the terms of the 1948 Convention on the prevention and punishment of the crime of genocide; of the 1965 international Covenant on the elimination of all forms of racial discrimination; and of the other sources of general international law set forth in article 38 of the international Court's Statute" (Liakopoulos, 2019).

[140]Application of genocide convention, provisional measures, order of 13 September 1993, in ICJ Reports, 1993, p. 325ss. And the separate opinion of judge Lauterpacht, p. 407, par. 102.

It is important to underline that according to Bosnia the behaviour in contrast with the mentioned international obligations would have been attributable to UK: “while acting in its capacity as a permanent member of the UN Security Council”. In this context and acting in violation of the right to self-defense against Bosnia, UK would have facilitated the violation of the prohibition of genocide “by actively opposing all of the efforts by other states to lift this illegal arms embargo (...)”[141].

Among the disputed behaviours were the fact that they had concurred with their own vote in the adoption of sanctions and the threat that for the revocation of the embargo decreed by the Resolution n. 713. The proceeding feared by the Bosnian party did not take place since the 20 December 1993 the parties issued a joint declaration, by which the Bosnian government renounced to the jurisdictional action following an agreement that served to extinguish the controversy in question (Gray, 1994). However, assuming by hypothesis that the Bosnian claim was legally founded, a dual responsibility could be reconstructed for UK. On the one hand, this state would have contributed with its vote to the adoption of a measure that in various respects was in contrast with international obligations and conversely, could not have been

[141]See statement of intention of the Republic of Bosnia and Herzegovina to institute legal proceedings against the United Kingdom before the International Court of Justice, 15 November 1993, par. 1.

adopted if the permanent members, in compliance with the rule of the two stage coaches, had prevented the adoption of the act in question. From this point of view it could be considered integrated the case of art. 58 DARIO. On the other hand, by preventing the cessation of the serious offense deriving from the sanctioning measures, the British conduct would have been in contrast with the obligation of cooperation sanctioned by art. 42, par. 1 DARIO.

Responsibility profiles and compliance with arms transfer agreements. International state responsibility for provisions violation prohibiting arms transfers

As we know, the internationalist doctrine does not exclude the Commission of illicit or international crimes through violation of the provisions governing international arms transfers.

The profiles of responsibility that will be explained below concern both the states, or the main actors of the "trade" in arms and the individuals, i.e. those who act as public officials of the state, as well as of those acting in a completely private capacity.

Arms transfer activities are typically implemented through exchanges between states. This is admissible because of the commercial monopoly established by the states as regards both the production phase and the sale of armaments, as well as on the

basis of an opinio juris progressively formed starting from the end of World War I.

Indeed, the need to “trade” armaments is linked to protect oneself or to defend oneself against possible threats of the use of armed force. Arms transfers, although dictated by legitimate self-defense purposes, nevertheless represent a threat to international security.

Moreover, the doctrine maintains that the preservation of international stability goes hand in hand, at least recently, with the respect of certain normative categories, which regulate the conduct carried out by the states in arms transfers, among which human rights, international humanitarian law and obligations arising by the UN Charter, in particular the observance of Security Council resolutions regarding restrictive measures imposed on certain states, are found (Bastid-Burdeau, 2007).

On this point, the recent Treaty on Trade in Armaments (hereinafter ATT) of 2013 was a useful starting point for most of the doctrine for analyzing the profiles of responsibility in international law (Bastid-Burdeau, 2007).

The doctrine is substantially unanimous in affirming that Articles 6 and 7 of the Treaty serve as the central pivot of the entire discipline, as they establish innovative constraints with respect to the previous and fragmented legislation. The scholar finds (in article 7) a prohibition of authorization to transfer following a

positive assessment of the likelihood of committing offenses (overriding risk) (Brandes, 2013). This evaluation, to use the terms of art. 7, must be done in advance, through, for example, the keeping of registers and the consultation of the same (as required by art. 9), or by drawing up a special list listing any state or not subjects, to which is associated with the Commission of offenses and the ascertained violation of international standards.

There must be not only an evaluation of the recipient of the transfer. According to the doctrine, the obligation of observance of general international law, which also refers to UN Security Council's resolutions which establish embargoes for arms, hangs not only on the state exporter, thus violating an erga omnes obligation, but also on destination (Bellal, Casey-Maslen, Giacca, 2012).

First of all, there is the general problem of concrete imputability for illicit arms transfers. Where the provisions do not clarify this profile, according to the scholar, it should always be possible to bring the responsibility back to the state, as the subject to whom is attributed the general duty of observance of international law, and especially of human rights (Bellal, Casey-Maseln, Giacca, 2012)[142]. Scholars see this approach emerge from specific obligations, such as that prescribed by Art. 5 of ATT, which

[142]Artt. 1(3), 55 and 56 of the UN Charter.

requires the establishment by state governments of adequate control systems which allow the prevention of illicit arms transfers. Furthermore, the responsibility of other national actors (whether public or private) involved in the transfer, at least in terms of domestic law, is not excluded.

The violation of international law can take place through a considerable number of activities. This would depend, according to the prevailing orientation, on the terminological breadth that is attributed to the term transfer, which is broader than the mere sales or supplies, considered a specification of the first category.

With regard to the protection of human rights, there are no international rules that prohibit prima facie illicit transfers. The main purpose of the human rights treaties is to ensure that states respect and observe the fundamental rights of the subjects, outside as well as within the sphere of jurisdiction (Bellal, Casey-Maseln, Giacca, 2012). The violation of these rules can derive from the transfer of certain weapons, subsequently used by unauthorized subjects to possess such weapons. It is believed that this would involve at least an obligation to investigate these ends, in the light of national law, as well as of the (poor) international law.

Again with reference to the ATT, art. 6, para. 2 establishes an additional obligation for the states, placed in relation to that on the control of transfers, both in an active (for the seller state) and

passive (for the acquiring state) sense. "(…) We consider the case of a state that does not use, by choice or by necessity, adequate resources to ensure its citizens enjoy the right to food, health, be treated humanely in detention (…) the same state would be obliged not to authorize the passive transfer (i.e. the purchase) of conventional arms, if this involves the use of resources that could otherwise be used to allow full respect of those rights, at least when the purchase is not justified from national security needs (…)" (Bellal, Casey-Maseln, Giacca, 2012).

The doctrine, therefore, believes that there would not only be human rights immediately damaged by the use of weapons in the course of an armed conflict, but also those rights connected to the economic and social life of a nation, which are identified in the performance of the essential public services, financed with state funds. A possible "distraction" of the funds for these services, motivated by exceptions to the rights (which may be that of national defense (Doswald-Beck, 2011) but not legitimized in the light of existing instruments of international law, could constitute a violation by one state and the subsequent configuration of responsibility for the same[143].

[143]This situation is found, for example, in agreements to offset debts (offset agreements), often stipulated on the occasion of a defense procurement in arms. With these agreements, two states establish a compensation compromise between the purchase sum of the arms and any previous debts of

With reference to violations of international humanitarian law, in doctrine these can be configured when the arms trade, if carried out unlawfully, can adversely affect the principle of respect and observance of the conduct to be followed during an armed conflict[144]. Furthermore, the violation may also derive from transfers that have been prohibited.

---

the purchaser, and in which both the main transfer services and the military supply and assistance are determined, which are perfected in the mere maintenance of weapons (carried out principally or exclusively by the selling state), the training of local armed forces and can even establish services not immediately related to the service of military supply and assistance aimed at favouring the investments of supplier companies, or take advantage of the natural resources of the purchaser's territory on an entirely exclusive basis. The compensation, therefore, would also have the purpose of endorsing any further economic interests on the part of the seller towards the buyer, which has the opposed interest in reducing its debts towards the former. This, evidently, involves a considerable "distraction" of resources on the part of the purchasing state (normally, a developing country).

[144]Art. 1 common to the 4 Geneva Conventions, 12 August 1949, in the Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern pp. 205-224; art. 1 (1) of the 1st Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, 8 June 1977, Official Records of the Diplomatic Conference of the Armed Conflicts, Bern, Federal Department of Foreign Affairs, 1978. This approach has been confirmed by jurisprudence (International Court of Justice, Military Activities, para. 220)

The responsibility would be further aggravated, when it was ascertained that the state and its organs have knowledge that the transfer of arms could entail a serious risk of committing international crimes. Therefore, it is underlined how this approach is well exposed in Art. 6, para. 3, ATT, which, for scholars, would have an innovative character. The types of responsibility would be configured either for the state, for helping the Commission of an offense by another state (on the model of art. 16 of the Draft Articles on Liability in 2001), or to an individual, for complicity in an international crime.

However, the doctrine also points to interpretative difficulties arising from the reference to the term "knowledge". While admitting his penalistic matrix, and even wanting to ascertain the fact that knowledge, with respect to "awareness", prefigures a lesser psychological element, the scholar does not share the choice to use this term also in reference to state responsibility.

On the contrary, to ensure that this approach exists, it would be necessary to admit that the knowledge possessed by the public official who physically transfers the load of arms is the same possessed by the state of belonging or classification. This statement lends itself to obvious criticisms: For the doctrine, the

---

and practice (ICRC Statement on IHL criteria in Arms Trade Treaty, New York, 2010).

main difficulty lies in the fact that the delivery process qualifies as an administrative activity, and therefore put in place by several people, who form a “chain of transfer”.
If we consider that state administrations are organized hierarchically, the hypothesis proposed would be to configure the responsibility of the “chain” in the light of the joint criminal enterprise. An analogical reference to this institute, however, could give rise to a contrast with the ban on analog application. Therefore, not being able to resort to penal institutions by analogy, the need to decide on the question of individual responsibility incidentally in the judgment of state responsibility is revealed by the doctrine, but for the latter there would be no application of the test standard of the “beyond any reasonable doubt” typical of the criminal trial.
So what would be the correct criterion? The doctrine provides an interpretative solution, basing the characterization of the conduct conducted as attributable to the state as an apparatus. Indeed, it would be impossible to disregard the role of public official in the delivery of arms, and it would be equally impossible to disregard the classification of this subject acting within the bureaucratic-administrative structure of the state as a whole.
Therefore, it becomes easier to configure the responsibility of the state based on the reasons recognized by the doctrine, or because

of the assistance of a state in the Commission of an international offense by another state, and therefore having as reference the requisites required by Art. 16 of the draft of articles on the international responsibility of states, which mentions the "awareness, on the part of the assistant state, of the circumstances of the offense" (Bellal, Casey-Maslen, Giacca, 2007).

So what would be the correct criterion? The doctrine provides an interpretative solution, basing the characterization of the conduct as attributable to the state. Indeed, it would be impossible to disregard the role of public official in the delivery of arms. It would be also equally impossible to disregard the classification of this subject acting within the bureaucratic-administrative structure of the state as a whole.

Therefore, it becomes easier to configure state responsibility based on reasons recognized by the doctrine, or because of the assistance of a state in the Commission of an international offense by another one, and therefore having as reference the requisites required by art. 16 of the draft of articles on the international responsibility of states, which mentions the "awareness, on the part of the assistant state, of the circumstances of the offense (...)"[145].

Although we have previously insisted on the prevalence of the

[145]Para. ii).

author's awareness with respect to the knowledge possessed by the same, the orientation under examination confirms the impossibility of applying the concept of awareness through recourse by analogy to state responsibility. In fact, the having awareness here assumes the meaning of “being aware”, with the addition of an “intent” to assist in the Commission of the offense. This last requirement can generate further problems of interpretation and procedural nature. The proof of the end achieved through the transfer of armaments, even in view of a mere circumstance of exchange, could not coincide with the intent to commit international crimes, or international illicit actions such as aggression or unauthorized use of force. This is because, as explained above, the main purpose of the “trade” of arms for each state, to be presumed to be ab origine, is to avoid succumbing to a possible armed attack, therefore to defend itself. The burden of proof, according to doctrine, should be reversed in favor of the state due to a failure to foresee its fault within the discipline of responsibility.

“The very idea of “complicity” of an internationally wrongful act of another (state) necessarily presupposes an intent to collaborate in the Commission of an act of this kind and, hence, in the cases considered, knowledge of the specific purpose for which the state receiving certain supplies decides to use them. Without this

condition, there can be no question of complicity"[146].

Ago, therefore, highlights the non-necessity of a specific dolus, when armaments are transferred to another state, but only the malice of its collaboration and the subsequent representation of the consequences that may derive from it, accompanied by the intent of trasfer (Bellal, Casey-Maslen, Giacca, 2007)[147].

The proof of this knowledge can be provided in various ways: Through an ex post facto presumption, or subsequent to the Commission of the offense, or with one operates ex ante, such as the objective knowledge of reports of verification of serious violations of law international humanitarian or human rights, or even through mere factual circumstances.

This reasoning can be done, according to part of the doctrine, also with reference to the Commission of the crime of genocide and to the relationship with the complicity in the same. Taking into consideration ICJ jurisprudence (Bellal, Casey-Maslen, Giacca,

[146]Seventh Report on State Responsibility by Mr. Roberto Ago-The internationally wrongful act of state, Source of International Responsibility, A/CN.4/307, in Yearbook of International Law Commission, 1978, vol. II, Part One, p. 58, §. 72.

[147]The auhor affirms that, in the light of ICJ jurisprudence on the prevention of genocide, taking the formulation of a general rule "en connaissance de cause" of the Commission, even if only potential, of some international crime can raise some doubts.

2007), scholars argue that complicity in crime must result from a Commission or positive action, both for states and for other actors other than the state (Bellal, Casey-Maslen, Giacca, 2007). The doctrine also claims that the general obligation to prevent the Commission for the crime rests on the state. Therefore, it can be highlighted when the transfer is to be considered a material contribution (Bellal, Casey-Maslen, Giacca, 2007).

International criminal liability for crimes committed following arm transfers

However, as far as the individual responsibility is concerned, it should be pointed out that this is outlined when there are penal or administrative rules which punish the illicit transfer of armaments. Part of the doctrine believes that in international law there is still no provision for criminalizing these behaviours although it may be considered an illegal act, arms trafficking lacks of its own configuration as an international crime, and the choices of states to criminalize such conduct are well founded on the mere impulse of domestic politics.

In this regard, another part of the doctrine argues that such a gap would depend on the mere “exhortative” character of international norms, where the same “impose” on states an obligation to do,

that is, to foresee, through domestic law, these behaviours as unlawful[148]. But this type of obligation, which also translates into an obligation of result for the states, is immediately considered applicable to individuals, since doctrine qualifies it as an obligation having a customary nature (Ragni, 2013)[149]. Indeed, "the criminal liability of individuals in relation to conduct contrary to the rules on arms transfers could be ascertained directly under international law. In particular, we refer to the possibility of sanctioning the activity of individuals (...) involved in arms transfers, in the event that the arms transferred are used to commit international crimes (...)"[150].

---

[148]Article 5 (b) of the 2001 Protocol cited above; art. 10, on the activity of brokering, and 11, on the distraction of transfers, of the treaty on the arms convention.

[149]On the possibility of applying a general international standard to individuals, see the Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, in the case of Ayyash et al., Special Tribunal for Lebanon, Chamber of Appeal, 16 February 2011, STL-11-01 / I, para. 145 et seq. In particular, in the decision cited above, we note how the notion of terrorism applicable before the STL, and consequently its configuration as an international crime, derives above all from the customary nature of the phenomenon.

[150]The Guus Kouwenhoven case, as with other internal judicial events, will not be taken into account during the preparation of this work.

Therefore, what can be relevant in domestic law is the possibility that individuals, held responsible for trafficking in arms with other states, are judged on the basis of the institution of complicity in the Commission of crimes (aiding and abetting), as such subjects: "Provides (to) another person (s) useful for committing the crime, therefore he becomes liable in criminal matters in that with his conduct he helps (no) or knowingly favors the material author of an international crime, although not necessarily sharing its intentions (...)" (Laviolette, 1998; Nebesar, 1998; Henry, 2002; Williamson, 2008; Bettwy, 2011; Beigbeder, 2011; Kirby, 2012; Kelly, 2013; Behrens, Hennam, 2013; Mouthaan, 2013; Piccolo, 2013; Lingass, 2016)[151].

[151]The juridical formula is taken into consideration by a large part of international jurisprudence, including the judgment of 18 May 2012 of the Special Chamber for Sierra Leone in the Prosecutor v. Charles Taylor case, SCSL-03-01-T. Former president of Liberia, Charles Taylor was convicted of inciting and supporting the Commission of international crimes in Sierra Leone, through the supply of arms to the Rebel United Front (RUF) rebels. This appears to be the only ruling of an international court that directly takes into consideration the issue of aiding and abetting through the supply of armaments at the international level. The situation with regard to the Akayesu sentence issued by the Tribunal for Rwanda is different (ICTR-96-4, sentence of 2 September 1998, para. 533-37). In this case, there was the supply of armaments for the Commission of an international crime (specifically, genocide), but the transfer took place within the national territory.

As for the requirement of knowledge, which allows to impute state responsibility, so also for the imputability of complicity in international crimes, according to this orientation, a degree of knowledge would be required, understood as: "(...) The mere awareness of the subject who provides the assistance of the criminal purposes of the principal responsible and who with his actions assist him in the Commission of the crime (…)" (Liakopoulos, 2019).

According to this point of view, it would not only be necessary to achieve the object of incorporating information that allows the subject to set a mental framework, in which the Commission of international crimes is highly prefigurable. Individual criminal liability would further require that this information be processed by the aider, who, in turn, will have to come to an awareness of the probable Commission of the crime. This logical process is considered the minimum requirement for attributing assistance in the Commission[152].

Furthermore, the Furundžija (ICTY, IT-9517/ 1.T, sentence of December 10, 1998, para. 249) sentence takes into account a different territory than the locus commissi delicti, or rather the one of carrying out the armed conflict, as the supply in itself it had occurred outside the space of the supplier or broker, but the final result of the transfer was however the facilitation in the Commission of international crimes.

Even the reconstruction of psychological element lends itself to further criticism. The doctrine illustrates how in some cases the substantial effect was put forward (Martins Amorium Dutra, 2012; DeGuzman, 2013; Shany, 2013; Botte-Kerrison, 2017)[153], which takes the form of a contribution that is essential for the Commission of the crime, facilitating or accentuating its effects (Leandro, 2013)[154]. In others, on the other hand, the requirement of intent was emphasized, establishing that it should be specifically oriented (specific direction) to commit international crimes, when there was geographical, material or other proximity between the activities of the supplier and those of Commission of crimes (Subotić, 2014; Ostojic, 2014; Gow, Kerr, Pajic, 2014; Orentlicher, 2018)[155].

---

[152]See, for example, the Furundžija cases, para. 249; Prosecutor v. Blaškić, IT-95-14, 1.T, sentence of 3 March 2000, para. 286; Taylor, §§ 6904, 6947-6952.

[153]ICTY, Prosecutor v. Anto Furundžija, Judgment, TC, IT- 95-17/1-T, 10 December 1998, par. 162.

[154]Leandro considers that this criterion reflects customary law, with particular reference to arms transfers.

[155]ICTY, Prosecutor v. Perišić, IT-04-81, judgment of the Chamber of Appeal of 28 February 2013, § 36. This last configuration of the requirement contrasts well with the psychological element of the crime, understood as a single knowledge (Thus also in art. 25 (3) of the Statute of the International Criminal Court of 17 July 1998, in UN Treaty Series, vol. 2187, pp. 3). Unlike this perspective, the normative formula used by art. 6, § 3, of the Arm

Criminalization of illicit brokering and deviation of the arms load (diversion)

As seen above, arms transfers would take place, internationally, even by individuals, who would act as intermediaries between supplier and receiving party. This brokerage, in the common opinion, if not authorized by the selling state or the buyer, or even if totally prohibited by international standards, is considered illegal. The issue of illicit brokering more directly affects the ATT, where it establishes that states must adapt their internal regulations in order to adequately sanction those who provide an unauthorized intermediation service.

In doctrine, it is believed that this type of activity, connected with the main ones of transfer, is sustained in the provision of a service by individuals or juridical persons, such as companies of war production (Keppler, 2001; Wood, 2009). On this point, the 2007 Report of the UN Panel of Experts on Illicit Brokerage[156], took place, explaining what functions should be performed through the brokering service, namely:-Seeking business opportunities

Convention Treaty, which can be used to define the mens rea of the physical subject acting in the transfer of arms, and configure its responsibility.

[156]Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, 30 August 2007, A/62/16, § 9.

between several parties; -put two or more parts in contact; -provide any kind of assistance possible to facilitate the conclusion of the agreement, or assist the parties in the bargaining, preparation of meeting places, means to facilitate exchanges and related services; -assist the parties in the steps related to the preparation of the fundamental documentation (including end-user certificates, including falsified ones) and in the execution of the payment; -Finally, prepare a service for the supply or sale of weapons to third parties.

Another form of brokering can be identified, according to the panel's explanation, among those after-sales assistance activities, such as the preparation of a training service for the use of weapons, supply of spare parts, or even advice on the possibility of putting in practice, an offset agreement, in order to reduce costs or amortize them in subsequent periods[157].

The Report also takes into account the nationality of the broker and the illicit nature of the activity performed. With reference to the first point, the broker can be of the nationality of one of the contracting parties, or it can be a third party, and the activity that it provides can be provided in one of these three states, while is not certain that the transfer of arms it takes place in the state of

[157]Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, op. cit., par. 10.

nationality or in the contracting one, as also is not clear if the broker assumes, albeit for a limited period of time, the title of ownership of the arms transferred[158]. The character of illegality, on the other hand, according to the panel, derives from that of qualification that a state gives of such activity through its own regulations, both as regards the activities as a whole and taken individually[159].

This broad consideration of what the activities are, and the various events they can take on, is identified, on one side of the doctrine, as a systematic approach to the world of arms supply, where the supply and transfer chain could take unknowable paths, or outside the regulatory framework that has been established, thus facilitating the spread of illicit practices in the sale of weapons.

The indication of the panel on what are the relevant activities for the brokering would not seem to have been fully regulated, according to a large part of the doctrine, within the ATT. In fact, art. 10 affirms that states must adapt their internal regulations, based on the obligations of universal or regional international law, in order to adequately regulate and take various types of measures (both criminal and administrative) to counter the phenomenon of

[158]Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, op. cit., par. 11.

[159]Report of the Group of Governmental Expert on Illicit Brokering in Arms Transfers, op. cit., par. 13.

illegitimacy brokering. This seemed to be a step backwards from what had been established in a soft law instrument, such as the Program of Action against the proliferation of SALW.

Otherwise, a minority of the doctrine believes that, despite the lack of a prohibition expressed in the Treaty, the common opinion has spread that regulate and control the intermediation activity, allowing it only by subjects or bodies that have adequate authorizations, it would have the purpose to prevent that the weapons end up to people different from those indicated in the certificates of final user, and that the use for purposes different from those indicated is prevented.

Transfer activities may also be subject to a deviation from the set route, which may be classified as lawful or illegal, depending on the provisions contained in national or international regulations. This could happen in cases where there are no effective controls, which can be applied to end-user certificates, and which can also be ignored, or even not released, and thus facilitate arms trafficking. The problem of deviation (or diversion) is therefore relative to the inadequacy of controls.

The prevailing orientation highlights two types of diversion: The unauthorized deviation of arms loads (specifically SALW) that are sold lawfully, due to the lack of effective controls at the exit or entry of states, and that they are even less effective during the

journey made by the weapons, or the deviation that would occur due to the lack of adequate controls by the companies or those that deal with the production and sale of arms on behalf of states.

For scholars, diversion can take place at any stage of the transfer, including the phase following the arrival at the destination of the load and the screening of the regular documentation possessed for transport. It can also take the form of a report of disappearance or theft of the load, tending to associate this act with criminal complicity of the company. More often it can take the form of a diversion accomplished through the re-exportation of the cargo, which can be performed in cases where no specific clause has been provided in the exchange agreement, or when there is no provision of domestic law that prohibits it, or finally when the coordination between the various national authorities in charge of controls acts ineffectively, making these controls tamquam non essent.

Government and public law subjects may also be involved in the diversion of the load. In particular, according to statistical reconstructions, reported by the doctrine, is above all the military and state defense branches that commit such an offense, given the availability to them of both the load of armaments, and the certificates of use of the same, and finally due to the possible configuration of corruption phenomena to which they can adhere.

A significant example of the importance of diversion in international law is found in relation to the deviations of planes (and therefore of the related cargo).

Aircraft hijacking is described by the Institute of International Law as “acts of seizure or an exercise of control of aircraft in flight”. If such types of conduct were to be carried out, the doctrine considers it necessary that the states, in whose jurisdiction the perpetrator of the crime is located[160], take action to pursue the same, without prejudice to the possibility of proceeding with the extradition. To this is added the specific obligation of states to assist with any means possible the aircraft diverted into the territory of the same, subject to the consent of the owner and the flag state, as well as the due diligence obligations regarding the preparation of effective controls to land.

By applying these considerations to the loads of armaments (McWhinney, 1975), is possible to find the typical conduct that authoritative doctrine defines as “skyhijacking”, from which the definitions of “hijacking” derive for profit and “sky bandits” (McWhinney, 1975).

According to scholars, this would take place because of the end manifested during this type of activity, or the hijacking of the

[160]Convention on International Civil Aviation, firmed in Chicago on 7 December 1944, art. 1 et seq.

aircraft, as well as the seizure of the load of weapons, presumably takes place in order to take possession of a "sensitive" commodity, to profit from it directly (through its sale) or indirectly (by perpetrating various types of criminal offenses) (McWhinney, 1975).
Even with reference to the case of diversion, the doctrine strongly criticizes the choice made by Art. 9, ATT would have granted ample discretion to states both in deciding which activities should be considered as deviation of the load of arms, and in providing the most suitable means to foresee the illegality of such conduct, with the risk of nullifying the objective set by the treaty.

Tools for compliance with the required obligations

A last, but fundamental, reference must be made to the control mechanisms present in the context of international discipline of arms control, in particular drawing on general ideas from the observations on existing compliance mechanisms.
This paragraph will aim to illustrate first of all the meaning of constraint set by most of the arms control agreements, and in particular we analyze the legal influence of political value of these agreements. Later, any observance resulting from the provisional application of the agreements will be considered. Finally, the

analysis will focus on the exposition of the main control and fulfillment mechanisms of the treaties.

Political significance of arms control agreements

To "agreements" establishing a control on the proliferation of weapons is recognized the value of international agreement (Ahlström, 1999; Den Dekker, 2001). Their ability to bind the signatory states, however, does not depend on the nature or value, but on the value that is attributed to this type of agreement. Most of the doctrine underlines, in this regard, how there is a general political will to stipulate, but also is recognized the discipline of arms control based on principles of international law, such as the prohibition of armed aggression and respect for international peace[161], as set out in the UN Charter (Den Dekker, 2001).

In light of these rules, the doctrine emphasizes the willingness of states to enter into such agreements in order to drastically or greatly reduce their armaments, or limit their acquisitions, and thus protect international peace and security. The manner in which these agreements are stipulated is identified in political negotiations that lead to the conclusion of agreements (Den

[161]Art. 2 (4) of the Charter, to which is added the principle of equalization of states in the international community and the prohibition of interference in internal affairs, enucleated in art. 2 (1).

Dekker, 2001). Moreover, the doctrine would support the belief perceived by the states of a discipline of arms control as functional and instrumental to the pursuit of certain international political aims, or “to achieve the objective of improved security and, through that, to reduce the chance of war (…)” (Den Dekker, 2001).

Furthermore, part of the doctrine has subsequently been questioned about the opportunity that states have to stipulate non-binding agreements on armaments. In this sense, we highlight three characteristics, which are found in most agreements of this type.

The first would be found in the flexibility of these types of agreements, by virtue of the changing nature of certain situations that must be regulated and the need to have an instrument adaptable to the situation that arises. Moreover, the need to have a flexible agreement would also be identified in the possibility of renegotiating the terms of the agreement at a later time, thus avoiding the rigidity typical of most binding agreements of international law (Ahlström, 1999).

The second characteristic would be identified in the rapidity of stipulating these types of agreements, or a state would be more inclined to conclude them where is not necessary to follow any solemn procedure (Ahlström, 1999). This, however, is also

considered in the light of domestic law, which differs from state to state in the regulation of transposition and adaptation methods to these types of agreements (Bjorge, 2014, Hollis, 2020; Fitzmaurice, Merkouris, 2020)[162].

The third, finally, would be identified in the confidentiality that is generated by agreements of this type, or the need not to make the results of transparent, at least internally, negotiations in order to avoid the intervention of the legislative power, which could, in some cases, deciding to authorize parliamentary ratification of the agreement just signed (Ahlström, 1999).

Political significance can also be deduced from the classification of arms control agreements. In particular, part of the doctrine holds that a greater distinction should be made between treaties for which there has been a voluntary entry or accession by states and those having a "coercive" nature, such as ceasefire agreements or peace treaties. With specific reference to the first category, the types of agreement are identified according to general models, that is distinguishing between bilateral treaties[163], multilateral agreements and accessory documents or annexes to treaties. As regards conventional arms, the treaties open to

[162]In this sense see: art. 26 VCLT.

[163]In which we understand above all the agreements for the limitation of nuclear proliferation, such as the SALT I and II agreements and the START Agreement.

regional distribution are important, which, according to the common opinion, would have a typical structure of multilateral treaties for arms control. A short text of a treaty nature, a series of attachments and related documents, in addition to the possibility of issuing derivative documents, for example where an institutional set-up has been provided[164].

Most of these agreements, however, would produce, according to the doctrine, a series of documents with merely programmatic value, which can easily address the future behaviour of states. The political nature of these agreements, therefore, would favor the accession of states to programs set up for arms control.

But in addition to a more direct function control, these instruments have a fundamental role in directing future negotiations of agreements for control, as well as establishing a basic procedure for negotiation (Den Dekker, 2001). Furthermore, there are also those who maintain that these agreements would enjoy more the application of the principle of good faith, due to the future expectations of international community for the observance of the discipline of this sensitive subject (Ahlström, 1999).

[164]As the periodic meeting of a conference of the States Parties, or as informal meetings for regulatory needs (eg, the Wassenaar Agreement).

Provisional application of arms control agreements

An argument of little debated in the doctrine, but that has a fundamental function, can be found in the provisional application, established with specific clauses, of agreements that regulate aspects relating to the control of weapons.

This need would seem to have arisen, as doctrine emphasizes, in the 1990s, when most of the disarmament agreements were stipulated. The need that has been found at the base of this progressive discipline, and consequent provisional application, is the urgency of application and fulfillment of such agreements, where is believed that the discipline in question must find an immediate application before the attainment of the number of ratifications needed (Michie, 2005).

The possibility of having recourse to these clauses is found in the connection that one has between the necessary urgent application and the weightings that must be had internally, or rather one must take into account above all the requirements of domestic law, the adjustment in progress, the costs that must be addressed, as well as the ratification authorization processes that must be completed in order for the agreement to be applied in the ratifying states (Michie, 2005). “Political” considerations are also extended to the

possibility of including certain states that have a particular technological and military advancement in the field governed by the single treaty. This, therefore, would be read, by the states and by doctrine, as a conditional requirement, to which the ratification of the treaty will be subject (Michie, 2005).

The provisional application would, in fact, also have legal implications of no small importance. In fact, given the political significance of many agreements, as seen above, the parties will take into consideration the fact that every type of act, carried out by a single contractor and that is in contrast with the object and purpose of the agreement, can produce negative future consequences for other parts. For this reason, in the interim period between the opening to the signing and the entry into force of the agreement, the provisional application would also have the function of avoiding any conflicting attitude, by virtue of the application of the principle of good faith in international agreements (Michie, 2005)[165]. And this principle would also be addressed by the minority doctrine as a more stringent obligation in the field of disarmament and arms control, given the sensitivity of subjects dealt with and the close connection with the preservation of international peace and security[166].

[165]Art. 18 VCLT.

[166]International Law Association, Final Report of the Committee-International And National Legal Regulation for Arms Control and Disarmament, Berlin,

Compliance with agreements and mechanisms

Since most of the arms control agreements are characterized by a lack of constraint, are there possibilities to enforce the obligations set by these agreements or understood in full?

A large part of internationalist doctrine tried to answer this question, when it approached with a critical evaluation of these treaties. A prevalent orientation has tended to affirm that these agreements have established a sort of "international cooperation law", where it was necessary to regulate, through multilateral channels, common problems of the international community, and in particular the threat of a nuclear explosion or the proliferation of conflicts worldwide (Ulfstein, Marahaun, Zimmermann, 2007). In this regard, this orientation underlines how the compliance of a state with the obligations provided by the treaty to which it is a part is not only an abstract aspect and of, so to speak, "moral" nature in international law, but is even in the interest of parts of

2004, para. 5. This would seem true at least in the case of nuclear weapons and mass destruction in general. Such an obligation would not be present or verifiable in the context of conventional arms, where the Report itself (§ 11 et seq.) mentions only the exhortative character of the instruments of international law and the role of implementation and consultancy that NGOs carry out in this field.

the treaty. Therefore, it would be the basis of the establishment of compliance mechanisms, or fulfillment, of the treaties concerning arms control (Ahlström, 1999).

On the other hand, it has been argued that ensuring compliance and adaptation to this type of agreement would not be possible, given the overriding political nature of the constraint assumed and the possibility for states not to feel bound by such provisions (Williamson, 2003; Haramoto, Sakai, Shibata, 2015; Sandholtz, Whytock, 2017; Bowman, Kritisiotis, 2018).

More specifically with regard to individual mechanisms, the prevailing doctrine identifies three main instruments for compliance, namely the procedures for the peaceful resolution of disputes, the infringement and for the implementation procedures, fulfillment and verification of the obligations of the treaty (Marahaun, 2007).

With regard to the first instrument, its diffusion was considered central at the beginning of the 20th century, when the Hague Conferences established the principle of peaceful resolution of international disputes to replace the use of force in international relations (Merrils, 2011). Generally, few recent examples of clauses for the resolution of disputes concerning the interpretation or application of an arms control treaty are known, and the doctrine tends to evaluate this lack of provision as a repulsion for

a “repressive” instrument of states behaviour, who continue to feel unconstrained in treaties of this type. Recently, however, a minority orientation of the doctrine would have supported the need to resolve disputes on the matter through the institution of arbitration.

Preferable, according to the doctrine, would seem the instruments of the second type, or fulfillment clauses, between which the procedures for the application and observance of the treaty are found. For the first type, the prevailing doctrine holds that such predictions cannot be lacking in arms control treaties, since they would have the function of preventing the dispute from degenerating into harmful effects for the application of the treaty, even compromising future compliance with the agreement (Den Dekker, 2001; Marahaun, Harahaun, Zimmermann, 2007)[167].

[167]From a historical point of view, however, the first tendency towards disarmament was to attribute a specific power to the Security Council, due to the sensitivity of the matter treated and the possible assimilation as a threat to national peace and security. This tendency would seem to have been arrested on the basis both of the impossibility of adopting sanctioning measures, given the Council's blockade during the Cold War, and on the basis of a clear desire by the States to create specific and self-managed control systems. On the self-sufficiency of international regulatory regimes, see the Report of the Study Group of the International Law Commission on the fragmentation of international law, A/CN.4/L.682, of 13 April 2006.

These would also appear to be accompanied by tools of the third type, namely the procedures for verification, inspections and controls, typically found in treaties for the control of weapons of mass destruction[168], whose function would be to make transparent situations considered illegal, and therefore would have the possibility to highlight, through the reconstruction and analysis of facts, the unlawfulness of which one complains.
As regards the distinction between this type of mechanism (very similar to inquiry or consultation) and the judicial resolution of disputes, the doctrine is not uniform in laying down a precise distinctive sign between the two. This is mainly due to what should be considered a controversy in the area of arms control. In this sense, the doctrine would not be uniform in considering what mechanism is necessary to apply to a given situation. A first orientation maintains that the resolution of disputes is experienced when an interpretation relating to the fulfillment of the obligations of a treaty cannot be achieved through the sole experiment of a verification, which, as just illustrated, would be limited to an assessment of the disputed facts, and not even to provide a

[168]An example can be found in art. 9 of the Convention on the prohibition of the development, production, storage and use of chemical weapons and on their destruction, signed in Paris on 13 January 1993, in UN Treaty Series, 1997. vol. 1975, n. 33757, pp. 470ss.

decisive interpretation (Trimble, 1989; Den Dekker, 2001)[169]. According to a minority orientation[170], in the arms control treaties it would also be possible to carry out countermeasures, which do not have the nature of retaliation, such as also withdrawing, denouncing or ending the treaty, where "extraordinary

[169]Trimble clearly explains the difference between the instrument of the investigation and the other means of resolving disputes, arguing that the former would have a mere ascertainment function, becoming very often instrumental to the latter where there is uncertainty about a mere fact to be ascertained for the purpose of a negotiation, or when it is necessary to resolve a dispute judicially.

[170]Agreements of this type are considered by the doctrine as self-sufficient regimes, where institutional systems for control are envisaged, and consequently provisions are provided for the resolution of any disputes (for example, the cited Chemical Weapons Convention, or the Convention on non-compliance, proliferation of nuclear weapons in 1978, which established the International Atomic Energy Agency, a body responsible for verifying the fulfillment of the states that develop nuclear energy programs). It is not infrequent, however, that, following the non-fulfillment of the provisions, states decide the application of economic countermeasures, or even resort to the collective security system provided for by the UN Charter. Given the potential threat to international peace and security that these types of weapons hold, the Security Council would be entitled to intervene. This is the case of Iran, subjected to penalties for failure to comply with the IAEA obligations between 2002 and 2015. As regards the area of conventional

events"[171]occur that prevent the continuation of the contractual relationship and therefore determine the termination of the execution of the treaty. Where the treaty is multilateral, the doctrine still supports the possibility of suspending the agreement for a serious violation of the treaty, based on Art. 60 (2) (c) of the Vienna Convention, which would be applied beyond its express formulation, as it was considered a general rule (Marahaun, 2007). Finally, it is generally considered that the sanctions of the UN Security Council are admissible, where the compliance mechanisms are not effective and there are no further remedies for violations. The Council, therefore, will have a power of intervention, when the situation generated may be likely to threaten international peace, pursuant to Art. 39 of the UN Charter (Henriksen, 2019). This power, in fact, would seem to be considered residual, since the states themselves regulate the matter and expressly provide for compliance mechanisms (Marahaun, 2007).

---

arms, such measures would not be envisaged, therefore having to support the sole possibility of resolution peaceful settlement of disputes between States Parties.

[171]This expression is reported in art. IV of the Limited Test Ban of 1963, and is placed in relation to the supreme interests of the state that intends to withdraw, denounce or terminate the treaty.

Concluding remarks

The complicity of states in acts carried out by international organizations within the framework of the regulatory activities is based on the assumption that a third-degree source of the order is likely to integrate an illicit fact. In our opinion, this hypothesis can be seen in the decisions taken by the functional bodies that are not only binding on their recipients but also have the characteristic of imposing specific conduct obligations without leaving any margin of discretion with regard to their execution. Determining whether or not an obligation to conduct has been violated appears to be rather simple. A violation will occur whenever the conduct known to you is active or omitted will not comply with the one imposed by the law to nothing, detecting the effects of misconduct.

We have seen how the examination of these profiles is conditioned by the difficulty of separating the conduct of the organ from that of individual states that compose it. In this regard, ICJ's jurisprudence seems to dispel any doubt, pointing out that the conduct of individual members is susceptible of a separate legal assessment with respect to that relating to the normative act that they combine to determine. In particular, the responsibility of these states for the vote expressed within a given body can be based on at least two different legal titles. In fact it can be

determined by the violation of a primary obligation that binds the individual member, as shown by the FYROM v. Greece case of 2001. The second legal title is relevant in our investigation, namely the hypothesis in which the vote expressed by the Member State integrates an accessory fact based on Art. 58 DARIO. We have tried to highlight how this specific case of complicity is conditioned on the one hand by the reported need to distinguish the will and activity of the state from that of the body of which the latter is a part and on the other by the need to guarantee the ordinary functioning of the organization as an independent subject by Member States.

The solution formulated by ILC in Art. 58 DARIO. In our opinion, the equilibrium point between the aforementioned autonomy of the functional entities and the need for the regulation to sanction the social disvalue represented by the conduct of Member States of these bodies is configured. The norm on complicity is therefore declined here in partially different terms from those reconstructed in chapter II of this work. The fundamental difference lies in the causal link between the accessory fact, constituted by members vote and the main fact constituted by the act approved by the organization and attributable to it. This requirement appears to be in terms of conditionality in the sense that is considered satisfied if the main

act would not have taken place without the intervention of the accessory conduct. In assessing the factual circumstances, the actual contribution of the Member State is relevant, which can also be measured in light of the weight assigned to it by the internal law of the principal responsible organization.

As a paradigm of this hypothesis, the role played within the UN Security Council by the permanent members who, based on UN rules, are able to influence the adoption or not the decisions of the board on the basis of Chapter VII of the UN Charter (Hamonic, 2018; Marc De La Sablière, 2018; Higgins, Webb, Akande, Sivakumaran, Sloan, 2018).

References

Ago, R. (1939). *Le dèlit international.* Recueil des cours, ed. Brill, Brussels, vol. 68, pp. 465ss.

Ago, R. (1971). Troisième rapport sur la responsabilitè des États. Le fait internationalement illicite de l'État, source de responsabilitè internationale, UN Doc. A/CN.4/246 and Add. 1-3. *Annuaire de la Commission du Droit International, vol. II,* p. 209-215, 267.

Ahlström, C. (1999). T*he status of multilateral export control regimes: An examination of legal and non-legal agreements in international cooperation.* Iustus Forlag, Uppsala.

Barros, A.S. (2015). Member states and the international legal (dis)order. *International Organizations of Law Review, 12,* pp. 334ss.

Bastid-Burdeau, G. (2007). Le commerce international des armes: de la sécurité à la défense de l'éthique et des droits de l'homme?. *Journal du droit international, 2 (4),* par. 7.

Behrens, R., Hennam, J. (2013). *Elements of genocide.* ed. Routledge, Taylor & Francis, Glass House Book, New York, pp. 194ss.

Beigbeder, Y. (2011). *International Criminal Tribunals.* ed. Palgrave, London.

Bellal, A., Casey-Maslen, S., Giacca, D. (2012). Implications of international law for a future arms trade treaty. *UNIDIR Resources*, pp. 13ss.

Bettwy, D.S. (2011). The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?. *Notre Dame Journal of International and Comparative Law, 1 (1),* pp. 102ss.

Bjorge, E. (2014). *The evolutionary interpretation of treaties.* Oxford University Press, Oxford, pp. 83ss.

Borchard, E.M. (1914). *The diplomatic protection of citizens abroad. The law of international claim.* The Banks Law Publishing Company, New York, pp. 181ss.

Botte-Kerrison, A. (2017). Responsibility for bystanders in mass crimes. Towards a duty to rescue in international criminal justice. *International Criminal Law Review, 17,* pp. 882ss.

Bouveresse, A., Ritleng, D. (2018). *L'effectivitè du droit de l'Union europèenne.* ed. Larcier, Bruxelles.

Bowman, M.J., Kritsiotis, D. (2018). *Conceptual and contextual perspectives on the modern law of treaties.* Cambridge University Press, Cambridge, pp. 165ss.

Brandes, M. (2013). “All's well that ends well” or “much ado about nothing”? A commentary on the arms trade treaty. *Goettingen Journal of International Law, 5 (2),* pp. 399-429.

Butkiewitcz, E. (1981-1982). The premises of international responsibility of inter governmental organisation. *Polish Yearbook of International Law, 11,* pp. 132ss.

Cannizzaro, E. (2006). A machiavallian moment? The UN Security Council and the rule of law. *International Organizations Law Review, 3*, pp. 190ss.

Clêment-Wilz, L. (2019). *Le rôle politique de la Cour de justice de l'Union europèenne.* ed. Larcier, Bruxelles.

Cortès Martin, J.M. (2008). *Las organizaciones internacionales: Codificatiòn y desarrollo progresivo de su responsabilida internacional.* ed. Tirant, Sevilla, pp. 30ss.

D'Aspremont, J. (2007). Abuse of the legal personality of international organizations and the responsibility of member states. *International Organizations Law Review, 4,* pp. 109ss.

Dahm, G. (1961). *Völkerrecht.* De Gruyter, Stuttgart, pp. 185ss.

De Visscher, C. (1924). *La responsabilitè des Etats.* Bibliotheca Visseriana. ed. Brill, Leiden.

DeGuzman, M. (2013). The International Criminal Court's gravity jurisprudence at ten. *Washington University Global Studies Law Review,* 12, pp. 476ss.

Del Pozo, M., Francisco, C. (2020). *El Tribunal de Justicia de la Uniòn Europea. Procedimento y recursos.* Editorial Aranzadi, Pamplona.

Den Dekker, G. (2001). *The law of arms control. International supervision and enforcement.* Martinus Nijhoff Publishers, Dordrecht, pp. 60.
Derlèn, M., Lindholm, J. (2018). *The Court of Justice of the European Union. Multidisciplinary perspectives.* Hart Publishing, Oxford & Oregon, Portland.
Doehring, K. (1997). Unlawful resolution of the Security Council and their legal consequence. *Max Planck Yearbook of United Nations Law, 2,* pp. 92ss.
Dominicè, C. (2013). The international responsibility of the United Nations for injuries resulting from non-military enforcement measures. In M. Ragazzi, *Responsibility of international organizations. Essays in memory of Sir Ian Brownlie.* Martinus Nijhoff Publishers, Leiden, Boston, pp. 367ss.
Dominicè, D. (2005). La responsabilitè internationale des Nations Unies. In J.P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Uines-commentaire aricle par article.* Economica, Paris, pp. 142ss.
Doswald-Beck, L. (2011). *Human rights in time of conflict and terrorism.* Oxford University Press, Oxford, pp. 67ss.
Dowhering, K. (1997). Unlawful resolutions of the Security Council and their legal consequences. *Max Planck Yearbook of United Nations Law, 1,* pp. 92ss.

Eagleton, C. (1928). *The responsibility of states in international law.* New York University Press, New York, pp. 60ss.
Fitzmaurice, G. (1952). The law and procedure of the International Court of Justice. *British Yearbook of International Law, 23,* pp. 28ss.
Fitzmaurice, M., Merkouris, P. (2020). *Treaties in motion. The evolution of treaties from formation to termination.* Cambridge University Press, Cambridge, pp. 282ss.
Frank, D. (1999). *Verantwortlichkeit für die Verletzung der Europäischen Menshenrechtkonvention durch internationale Organisationen.* Helbing & Lichtenhahn, Basel.
Gaja, G. (1988). Some reflections on the European Community international responsibility. In H.G. Schermers, T. Heuckles, P. Mead, *Non-contractual liability of the European Communities.* ed. Brill, Dordrecht, pp. 172ss.
Geslin, A. (2005). Rèflexions sur la repartition de la responsabilitè entre l'organisation internationale et ses États membres. *Revue Gènèrale de Droit International Public, 109,* pp. 550ss.
Gow, J., Kerr, R., Pajic, Z. (2014). *Prosecuting war crimes, lessons and legacies of the International Criminal Tribunal for the Former Yugoslavia.* ed. Routledge, Abington & New York.
Gray, C. (1994). Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzeovina

v. Yugoslavia (Serbia and Montenegro)), orders of provisional measures of 8 April 1993 and 13 September 1993. *International and Comparative Law Quarterly, 43,* pp. 704ss.
Hamonic, A. (2018). *Les relations entre l'Union europèenne et l'ONU dans le domaine de la gestion des crises.* ed. Larcier, Bruxelles.
Haramoto, S., Sakai, H., Shibata, A. (2015). *L'être situè. Effectiveness and purposes of international law. Essays in honour of Professor Ryuichi Ida.* ed. Brill, Bruxelles, pp. 223ss.
Henderson, C. (2017). *Commissions of inquiry. Problems and prospects.* Bloomsbury Publishing, New York.
Henriksen, A. *International law.* Oxford University Press, Oxford, 2019.
Higgins, R., Webb, P., Akande, D., Sivakumaran, S., Sloan, J. (2018). *Oppenheim's international law: United Nations.* Oxford University Press, Oxford.
Hirsch, M. (1995). *The responsibility of international organizations toward third parties. Some basic principles.* Martinus Nijhoff Publishers, Dordrecht, Boston, London, pp. 83ss.
Hoijer, O. (1930). *La responsabilitè internationale des États.* Les Éditions Internationales, Paris, pp. 31ss.

Hollis, D.B. (2020). *The oxford guide to treaties.* Oxford University Press, Oxford

Katz Cogan, J., Hurd, I., Johnstone, I. (eds), (2016). *The Oxford handbook of international organizations.* Oxford University Press, Oxford.

Kelly, M.J. (2012). The debate or genocide in Darfur, Sudan. *Davis Journal of International Law & Policy, 19 (1),* pp. 208ss.

Kelly, M.J. (2013). The parameters of vicarious corporate criminal liability for genocide under international law. In A. Byrnes, C. Hayashi-Michaelsen, *International law in the age of globalization.* ed. Brill, The Hague.

Keppler, E. (2001). Preventing human rights abuses by regulating arms brokers: The US. Brokering amendment to the arms export control act. *Berkeley Journal of International Law, 19 (2),* pp. 381-411, 386ss.

Kirby, P. (2012). How is rape a weapon of war?, Feminist international relations, modes of critical explanation and the study of wartime sexual violence. *European Journal of International Relations, 18.*

Kirgis, F.L. (2003). Security Council Resolution 1483 on the rebuilding of Iraq. *American Journal of International Law, 97.*

Klein, P. (1998). *La responsabilitè des organisations internationales dans les ordres juridiques interne set droits de*

gens. ed. Bruylant, Bruxelles, pp. 386ss.
Klein, P. (2010). The attribution of acts to international organizations. In J. Crawford, A. Pellet, S. Olleson, K. Parlett, *The law of international responsibility.* Oxford University Press, Oxford, pp. 300ss.
Klein, P. (2012). Les articles sur la responsabilitè des organisations internationales: Quel bilan tirer de travaux e la CDI?. *Annuaire Français de Droit International, 58,* pp. 19ss.
Kolb, R. (2000). *La bonne foi en droit international public, Contribution à l'ètude des principes gènèraux de droit.* PUF, Paris, pp. 510ss.
Lanovoy, V. (2016). *Complicity and its limits in the law of international responsibility.* Hart Publishing, Oxford & Oregon, Portland, pp. 123ss.
Laviolette, N. (1998). Commanding rape: Sexual violence, command responsibility and the prosecution of superiors by the international criminal Tribunals for the Former Yugoslavia and Rwanda. *The Canadian Yearbook of International Law, 36,* pp. 94ss.
Leandro, A. Arms transfer and complicity in war crimes. In F. Pocar, M. Pedrazzi, M. Frulli (eds.), *War crimes and the conduct of hostilities.* Edward Elgar Publishers, Cheltenham, Northampton, 2013, pp. 225ss.

Leinarte, E. (2021). *Functional responsibility of international organisations. The EU and international economic law.* Cambridge University Press, Cambridge.
Lenaerts, K., Gutierrez Fons, J.A. (2020). *Les mèthodes d'interprètation de la Cour de justice de l'Union europèenne.* ed. Larcier, Bruxelles.
Lenaerts, K., Maselis, I., Gutman, K. (2014). *European Union procedural law.* Oxford University Press, Oxford.
Liakopoulos, D. (2019). *The role of not party in the trial before the International Court of Justice.* ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020). *Complicity of states in the international illicit.* ed. Maklu, Antwerp, Portland.
Lingaas, C. (2016). Imagined identities: Defining the racial group in the crime of genocide. *Genocide Studies and Prevention: An International Journal, 9 (1),* pp. 82ss.
Marahaun, T. (2007). Dispute resolution, compliance control and enforcement of international arms control law. In G. Ulfstein, T., Marahaun, A. Zimmnermann (ed. by), *Making treaties work. Human rights, environment, arms control.* Oxford University Press, Oxford, pp. 243ss.
Marc De La Sablière, J. (2018). *Le Conseil de sècuritè des Nations Unies.* ed. Larcier, Bruxelles.

Martins Amorium Dutra, B. (2012). Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law. *Revista de Faculdade de Direito da UERJ, 37,* pp. 5ss.
Mchenry, J.R. (2002). The prosecution of rape under international law: Justice that is long overdue. *Vanderbilt Journal of Transnational Law, 35,* pp. 1310ss.
Mcwhinney, E. (1975). *The illegal diversion of aircraft and international law.* Sijthoff, Leiden, pp. 10.
Merrils, J.G. (2011). *International dispute settlement.* Cambridge University Press, Cambridge, V° ed., pp. 4ss.
Michie, A. (2005). The law of arms control. International supervision and enforcement. *Journal of Conflict and Security Law, 10 (3),* pp. 345-377.
Mouthaan, S. (2013). Sexual violence against men and international law. Criminalising the unmentionable. *International Criminal Law Review, 13,* pp. 668ss.
Nebesar, D.A. (1998). Gender-based violence as a weapon of war. *U.C. Davis Journal of International Law and Policy, 4,* pp. 148ss.
Nedelski, N., Nollkaemper, A. (2012). Responsibility of international organizations, in “connection with acts of states”. *International Organizations Law Review, 9,* pp. 33ss.

Olalekan Yussuf, R. (2008). A critical evaluation of the UN Security Council's power in form of article 39 of the United Nations Charter: Interpretation, invocation and the morder threat to international peace and security. *Independent Student Journal Law,* pp. 7-9.

Oosthuizen, G.H. (1999). Playring the devil's advocate: The United Nations Security Council is unbound by law. *Leiden Journal of International Law, 12,* pp. 562ss.

Orakhelashvili, A. (2006). *Peremptory norms in international law.* Oxford University Press, Oxford, pp. 474ss.

Orentlicher, D.F. (2018). *Some kind of justice, the ICTY's impact in Bosnia and Serbia.* Oxford University Press, Oxford, pp. 376ss.

Ostojic, M. (2014). *Between justice and stability: The politics of war crimes prosecutions.* Ashgate Publishing, Farnham.

Papastavridis, E. (2007). Interpretation of Security Council Resolutions under Chapter VII in the aftermath of the Iraqi crisis. *International and Comparative Law Quarterly, 56 (1),* pp. 84ss.

Perez Gonzalez, M. (1988). Les organisations internationale et le droit de la responsabilitè. *Revue Gènèrale de Droit International Public, 92,* pp. 67ss.

Peters, A. (2012). The responsibility to protect and the obligation to give reasons for a veto. In J. Hoffmann, A. Nollaemper, *Responsibility to protect. From principle to practice.* Palas

Publication, Amsterdam, pp. 205ss.
Petiteville, F. (2021). *Les Organisations Internationales.* La Dècouverte, Paris.
Piccolo, I. (2013). *The crime of rape in international criminal law.* International Courts Association.
Quian, H. (2006). Chinese practice in public international law. *Chinese Journal of International Law, 5,* pp. 460ss.
Ragni, C. (2013). The contribution of Special Tribunal for Lebanon to the notion of terrorism: Judicial creativity or progressive development of international law. In N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni, *International courts and the development of international law. Essays in Honour of Tullio Treves.* T.M.C. Asser Press-Springer, The Hague, pp. 671ss.
Reinisch, A. (2001). Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic actions. *American Journal of International Law, 95,* pp. 852ss.
Reinisch, A. (2007). Veerfahrensrechtliche Aspekte der Rechtskontrolle von Organen der Staatengemeinschfat. In R. Hofmann, A. Reinisch, T. Pfeiffer, S. Oeter, A. Stadler, *Berichte der Deutschen Gesellschaft für Völkerrecht: Die Rechtskontrolle von Organen der Staatengemeischaft; Vielfalt der Fericht-Einheit des Prozessrecht?.* C.F. Müller, Heidelberg, pp. 44ss.

Rideau, J., Grewe, C., Balmond, L., Arcari, A. (2010). *Sanctions ciblèes et protection juridictionnelle des droit fondamentaux dans l'Union europèenne. Équilibre et dèsèquilibre de la balance.* ed. Anthemis, Bruxelles.

Ritter, J.P. (1962). La protective diplomatique à l'egard d'une organisation internationale. *Annuaire Français de Droit International, 8,* pp. 442ss.

Sandholdtz, W., Whytock, C.A. (2017). *Research handbook on the politics of international law.* Edward Elgar Publishers, Cheltenham.

Sarroshi, D. (2013). International organizations and state responsibility. In M. Ragazzi, *Responsibility of international organizations. Essays in memory of Sir Ian Brownlie.* Martinus Nijhoff Publishers, Leiden, Boston, pp. 86ss.

Seaman, K. (2016). *United Nations: The United Nations, peacekeeping and global governance.* ed. Routledge, London & New York.

Seidl-Hohenveldern, I. (1987), Responsibility of member states of an international organization for acts of that organization, in A.A.V.V., *Le droit international à l'heure de sa codification, in Studi in onore di R. Ago, III.* ed. Giuffrè, Milan, pp. 421ss.

Shany, Y. (2012). Assessing the effectiveness of international Courts: A goal-based approach. *American Journal of International*

Law, 106, pp. 225ss.
Shany, Y. (2013). How can international criminal Courts have a greater impact upon national criminal proceedings? Lessons from the first two decades of international criminal justice in operation. *Israel Law Review, 46,* pp. 4ss.
Söfker, C. (2014). *Durch die Besatzungsmacht geprägte Neuordnungen besetzter Staaten: Welche Auswirkungen haben Völkerrechtlich verbotene Angriffsriege und die Reichweite der Kompetenzen von Besatzungsmächten Untersucht am Beispiel des Irak-krieges.* H. Utz Verlag, München.
Subotić, J. (2014). Legitimacy, scope, and conflicting claims on the ICTY: In the aftermath of Gotovina, Haradinaj and Perišić. *Journal of Human Rights, 13(2),* pp. 172ss.
Trimble, P. (1989). Beyond verification: The next step in arms control. *Harvard Law Review, 102,* pp. 885-912.
Tzanakopoulos, A. (2011). *Disobeying the Security Council. Countermeasures against wrongful sanctions.* Oxford University Press, Oxford, pp. 39ss.
Ulfstein, G., Marahaun, T., Zimmermann, A. (ed. by). (2007). *Making treaties work. Human rights, environment, arms control.* Oxford University Press, Oxford, pp. 3ss.
Van Herik, L. (2017). *Research handbook on UN sanctions and international law.* Edward Elgar Publishing, Cheltenham, pp. 241-

243.
Verdross, A. (1929). *Règles gènèrales de droit de la paix.* Recueil des cours, ed. Brill, Bruxelles, vol. 30, pp. 272ss.
Virally, M., (1974). La notion de fonction dans la thèorie de l'organisation internationale. In G. Abi-Saab, *La communautè internationale. Mèlanges offerts à Charles Rousseau.* ed. Pedone, Paris, pp. 286ss.
Von Münch, I. (1963). *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft.* P. Keppler Verlag, Frankfurt, pp. 170ss.
Voulgaris, N. (2014). Rethinking indirect responsibility. A study of article 17 of the draft articles on the responsibility of international organizations. *International Organizations Law Review, 11,* pp. 17ss.
Wengler, W., (1952). Recours judiciaire à instituer contre le dècisions d'organes internationaux: rapport et projet de rèsolution. *Annuaire de l'Institut du Droit International,* pp. 224ss.
Williamson Jr, R.L. (2003). Is international law relevant to arms control? Hard law, soft law and non-law in multilateral arms control: Some compliance hypotheses. *Chicago Journal of International Law, 4,* pp. 59ss.
Williamson, J.A. (2008). Some consideration on command responsibility and criminal liability. *International Review of the*

Red Cross, 90, pp. 306ss.
Wood, B. (2009). International initiatives to prevent illicit brokering of arms and related materials. *Disarmament Forum, n. 3,* pp. 5-16.
Zimmermann, A., Tams, C.J., Oellers-Fraham, K. (2019). *The Statute of the International Court of Justice. A commentary.* Oxford University Press, Oxford.

International responsibility, reparation for victims, wrongdoing of international organizations and disputes between individuals and states. Hypotheses and connections with illicit acts of organizations. What remedies, problems and solutions are proposed?

DOI:10.5281/zenodo.10572520

Dimitris Liakopoulos, Professor of International Law, European Union Law, International European Criminal and Procedural Law in various Universities in U.S. and Europe. Director of the CEIJ, New York. Attorney at Law (of Counsel).

Introduction

Attributing responsibility for wrongful conduct to an organization results in a jurisdictional gap with respect to victims. Speaking for reparations towards victims after the relative recognition of the organizations' immunities in domestic courts shows at the international level the absence of control mechanisms that are established by the relevant human rights treaties. And let's not forget that within this context the organizations themselves are

already inadequate from the point of view of internal organization. The related unlawful conduct against states puts the individual to try to access existing jurisdictional systems with regards to their control of an international nature (Liakopoulos, 2020d)[172]. This is obviously a theoretical control and the bodies involved in practice develop various sophisticated solutions.

The identification of the main hypotheses of responsibility of states (Crawford, 2013; Kolb, 2017; Liakopoulos, 2020a) connected with activities of organizations are found in the protective path of the European Convention on Human Rights (ECHR) and the supervision of the European Court of Human Rights (ECtHR). This is a path with a broad argumentative interpretation relating to the responsibility of Member States explored and consolidated by the relevant jurisprudence of the EctHR.

In the next paragraphs we will try to investigate states' responsibility first with regard to the relevant conduct available to the organizations, to conduct implementing the obligations deriving from the membership of the states to the organizations and finally on related scenarios that have to do with behaviors

[172]The attribution of state conduct allows the victims to apply to the national courts of the state concerned. However, this possibility will not be examined here, consistently with the entire set-up of the work which takes into consideration the reparation obtainable exclusively in international law.

required by the governments and against organizations.

Offenses, state responsibility, force operations instituted by organizations and attribution of conduct offenses committed due to actions or force instituted by authorized organizations in which Member States participate through their militaries is a classic example of state responsibility for conduct kept under cover by acts of international organizations. Within this context we think of the peace operations of the United Nations such as the Stabilization Mission in the Democratic Republic of the Congo; the International Security Assistance Force in Afghanistan authorized by the Security Council; the African Union-United Nations Hybrid Operation in Darfur under the aegis of multiple organizations as multinational operations (Grenfell, 2016; Okada, 2019).

It is a complexity of contexts under the reference of different subjects. The authorization of the operation is established by an organization where the sending state of the military makes the organs available on a temporary basis and the state hosts the mission in its territory. The establishment of this type of organizations by the United Nations (Marhic, 2013) is an environmental circle that is limited in our investigation due to the tasks that are generally distributed such as the organization that predetermines the mandate and objectives of the operation

according to the figure of the Secretary General who is the supreme command of the mission (Fröhlich, Williams, 2018; Tanaka, 2018)[173], and/or to the relevant sending states which are entrusted: "(...) the ordinary activities linked to the stationing of the mission on the territory of the host state, including the preparation and training of the military, the administrative and disciplinary functions, as well as the fundamental exercise of jurisdictional functions in criminal matters. The role of the state that hosts the forces territorially is instead generally rather reduced (...)" (Amrullah, 1976; Liakopoulos, 2020c)[174]. Thus we can hypothesize that the employed military places their conduct in

[173]"(…) The commander of the mission, in turn, guides the individual national commanders at the head of the relative contingents sent by the states through an articulated chain of command. The recruitment of national contingents takes place by means of specific supply agreements stipulated between the government of the sending state and the General Secretary (...)" (see for example UN Doc. S/5575, of 4 March 1964, par. 4, as far as regards the United Nations Peacekeeping Force in Cyprus (UNFICYP) operation and see UN Doc. S/RES/743 (1992) of 21 February 1992, paragraph 2 regarding the UNPROFOR operation).

[174]"(…) The supplier state, unlike the territorial one, retains significant powers over the organs made available to the organization, although the organization maintains a command and an operational control of the mission. On the possible complicity of the territorial state in the commission of an offense (…)".

violation of the norms for the protection of human rights as a central point that concerns the attribution of these conducts in a cumulative way to the sending states and to the organization that establishes or authorizes the military operation.

The problem is the complexity of the discipline of international responsibility due to the peculiar organic nature of the military contingents that are available to the organization and due to the use of institutional-regulatory criteria of a factual nature according to the objectives of attributing the conduct. The soldiers under the cover of the UN can be defined as double agents since they are subject to a "double commandment" "(...) such that they do not cease to constitute bodies of the respective sending states, despite being incorporated into the operation of the Organization. In principle, the dual organic nature should correspond to the possibility of attributing conduct simultaneously to the sending states and the organization (...)" (Marchic, 2013).

The attribution of double or multiple nature of the conduct was considered in the Draft of Articles on the Responsibility of International Organizations (DARIO), when the special rapporteur of the project found that: "(...) illicit conduct did not necessarily have to be attributed in exclusive route to a single subject". In this regard, some examples taken from practice were recalled, including the bombing of the former Yugoslavia by NATO in

1999, attributable both to the organization, responsible for planning the military operation, and to its Member States, responsible for having carried it out. Comment DARIO fired in 2011 does not exclude tout court the possibility of a double (or multiple) attribution of state conduct and organizations. It fails, however, to indicate with sufficient precision on the basis of which legal or factual criteria this can take place. Art. 6 of the DARIO Project (relating to the conduct of a body or agent of the organization) is intended to operate when the state body is fully detached and, therefore, incorporated into the structure of the organization to the point of making it its de jure body. Art. 7 (relating to the conduct of a state body or an organization made available to another organization) would find application in more complex situations, in which the state body does not remain completely detached, but maintains an organic connection with the state, while operating in the context of an organization intended to apply precisely in relation to the conduct implemented by the military contingents made available by the supplier states in the operations planned by the United Nations. Additionally, in Art. 7 DARIO, the conduct of the body made available to the organization is attributable to the latter only to the extent that it exercises effective control over such conduct. The provision therefore seems to introduce a criterion, that of “effective control”

which in itself is not suitable to attribute the conduct, by way of double attribution, to states and organizations. In other words, it allows the conduct to be attributed exclusively to the organization that receives the organ and not also to the state that sends it (...)" (Nollkaemper, Jacobs, 2013; Kolb, 2017; Crawford, Keene, 2018; Schönsteiner, 2019; Liakopoulos, 2020a).

The attribution of conduct in a simultaneous manner between states and organizations is based on other provisions which are contained in the Draft of Articles on the International Responsibility of the state (DARSIWA) and DARIO, respectively in Art. 4 DARSIWA and Art. 6 DARIO (Kolb, 2017; Liakopoulos, 2020a). Art. 48 DARIO envisaged the hypothesis of responsibility that was shared by the same conduct but conferring a kind of attribution of a multiple nature and not of the same conduct (Liakopoulos, 2020a). The organization has called de jure elements, i.e. the fact that military subjects are made available to the states transforming them into real bodies of the organizations. They also represent de facto elements given the alleged effective control exercised by the organizations over the forces. On the contrary, the responsibility of the sending states is recognized only in exceptional circumstances, so the damage caused by soldiers to people and things results in serious negligence of the sending state or violations of international humanitarian law obligations

(Liakopoulos, 2020a).

The agreement stipulated between the UN and the supplier state provides that: “(...) United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the government in the performance of services or any other activity or operation under this agreement (…)”. If the loss, damage, death, injury arose from gross negligence or willful misconduct of the personnel provided by the government, the latter will be liable for such claims, thus introducing a distinct discipline depending on whether the conduct was carried out ultra vires or not (Tanaka, 2018). The application criteria relating to the attribution of the conduct under investigation have been slow in the decisions rendered by international or national courts after the adoption of the project. Article 7 DARIO already established the attribution of the conduct to the responsible state and not to the organization (Liakopoulos, 2020a).

The position of the ECtHR and attribution to the conduct

In the first years the ECtHR recognized exclusivey the possibility of recognizing the attribution of the conduct to the sending states

of the troops as we saw in the Nissan case[175] and in the Bici (Morgan, 2013)[176] and Al-Jedda (Orakhelashvili, 2008; Szydło, 2012)[177] cases decided by the UK courts. Cases that are also addressed in Behrami and Behrami v. France and Saramati v. France, Germany and Norway much discussed by court's jurisprudence (Klein, 2007; Sari, 2008; Bodeau-Livinec, Buzzini, Villalpando, 2008; Milanovic, Papic, 2009; Bell, 2010; Sari, 2012; Boisson De Chazournes, Pergantis, 2012; Moelle, 2013; Tomuschat, 2014; Seibert-Fohr, Villiger, 2017; Sudre, 2021; Rainey, Wicks, Ovey, 2021; Villiger, 2023)[178].

[175]Nissan v. Attorney general, decided from Queen's Bench Division, [1969] UKHL J0211-1.

[176]Bici v. Ministry of Defence (Court of Appeal, Queen's Bench Division, [2004] EWHC 786 (QB) of 7 April 2004): "(…) a civil compensation for the conduct carried out by the British contingent in service in Kosovo, under the cover of the United Nations mission. In this circumstance the attribution of conduct to the United Nations has never been questioned as "[t]he Crown retained command of the British forces notwithstanding that they were acting under the auspices of the U.N. (…)".

[177]House of Lords, R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), sentence of 12 December 2007.

[178]ECtHR, Behrami and Behrami v. France, Saramati v. France, Germany and Norway of 2 May 2007. And in the same spirit see also by the same Court: Milisavljević v. Serbia of 4 April 2017. Al Nashiri v. Romania of 31 May 2018.

Both in the operations of the UNMIK and KFOR they did not act on the direct initiative of the supplying states but after delegation from the Security Council which determined the related "(...) conduct (…) due to the "ultimate control and ultimate authority" exercised by it. On this basis, the Behrami and Saramati appeals were declared inadmissible ratione personae (…)" (Sari, 2012; Villiger, 2023). These are unconvincing positions on a legal level and worrying due to the lack of protection that had as its main objective (Sari, 2012)[179] and one could read: "(...) a clear attitude

[179]"(…) The risk that Beherami and Saràmati could create a void in the protection of ECHR rights is compounded by the ECHR's rejection of the applicants submissions based on Bosphorus case (…) saying they are free to do whatever they wish to do and escape any human rights scrutinity as long as they protect themselves by obtaining the imprimatur of an international organization (…). The Court considered the state to retain liability under the Convention for treaty commitments subsequent to the entry into force of the Convention (…). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides: By "equivalent" the Court means "comparable". Any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (…). Any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection (par. 155). (…) If such

of deference towards the Security Council". Some passages of the decisions can be interpreted in this light on the importance of the objectives pursued by the Security Council when it acts pursuant to Chapter VII of the Charter and the function that this political body performs in the management of peace and security of the entire international community (Rainey, Wicks, Ovey, 2021)[180].

---

equivalent protection is considered to be provided by the organisation, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (...)" (par. 156).

[180]"As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective (…) the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions (under Chapter VII of the UN Charter) and occur prior to or in the course of such missions, to the scrutiny of the court" (ECtHR, Behrami of 2 May 2007, par. 149-150-151). According to some authors: "[t]his reference to the imperative peace and security aim and to the effectiveness of Security Council action in this field shows that the court's real interest is focused on the values enshrined in collective security action, more specifically on ensuring public safety and the smooth international administration of

The statements that we saw in the Behrami case were jurisprudential traces that we also encountered later in the cases: Kasumaj v. Greece (Costa, 2017; Rainey, Wicks, Ovey, 2021)[181], Gajic v. Germany[182] and Berić and others v. Bosnia and Herzegovina (Seibert-Fohr, 2017)[183], Güzelyurtlu and others v.

Kosovo. More than the formal primacy of UN Security Council obligations, it is the primacy of some UN substantive values that is at stake (…)".

[181]ECtHR, Kasumaj v. Greece of 5 July 2007.

[182]ECtHR, Gajic v. Germany of 28 August 2007.

[183]ECtHR, Berić and others v. Bosnia and Herzegovina of 16 October 2007.

Turkey[184], Hanan v. Germany[185], Makuchyan and Minasyan v. Azerbaijan and Hungary (Milanović, Papić, 2021; Istrefi, Ryngaert, 2021)[186], Stephens v. Cyprus, Turkey and the UN where the Court has "(...) applied the test of "exclusive and ultimate control", referring precisely to the jurisprudence of Behrami and Saramati, together, however, with that of "effective control", as wanting to seek a conciliation with what was expressed by the DARIO Project and, at the same time, a reconsideration of its

[184]ECtHR, Güzelyurtlu and Others v. Turkey of 29 January 2019, par. 190: "(…) As Germany here did, does not, on its own, trigger by article 2 positive obligation to investigate (para. 135). In other words, the initiation of an investigation into an extraterritorial situation does not necessarily entail that the investigation has to be Convention-compliant. The Court notably says here that it's making this holding "without calling into question" the principles set out in Guzelyurtlu, when that's exactly what it is doing. (In that regard, only 3 of the 17 judges who sat on the Hanan bench also sat in the Guzelyurtlu Grand Chamber, even though the two judgments are only two years apart (…) because Germany had a duty to investigate grave breaches of IHL, because Germany had retained exclusive criminal law jurisdiction over its own deployed personnel, and because Afghanistan was not capable of conducting an effective investigation of the incident, there were "special features" that triggered the positive duty to investigate under article 2 (…)". In the same spirit see also: Romeo Castaño v. Belgium of 9 July 2019.

[185]ECtHR, Hanan v. Germany of 16 February 2021, par. 142.

[186]ECtHR, Makuchyan and Minasyan v. Azerbaijan and Hungary of 26 May 2020, par. 9.

previous positions (...)" (Doswald-Beck, 2011; Schabas, 2015; Langford, Vandenhole, Scheinin, 2017; Sudre, 2021)[187].

In the Al-Jedda case (Mallory, 2012; Mclachhlan, 2014)[188] relating to the military actions conducted in Iraq and authorized by the Security Council in 2003[189], the Court began to follow a path of discontinuity with previous jurisprudence, thus opening up and with progressive way towards the use of the multiple attribution criterion[190]. In particular, the Court stated: "(...) the exercise of

[187]ECtHR, Stephens v. Cyprus, Turkey and the UN of 11 December 2008. On that occasion the Court wondered if the conduct could be attributed not only to the Organization, but also to Cyprus and/or Turkey. This hypothesis has been rejected since "the states do not have effective control (...)". Stephens v. Cyprus, Turkey and the UN of 11 December 2008, which is stated that: "(...) the states do not have effective control (…)".

[188]ECtHR, Al-Jedda v. United Kingdom of 7 July 2011.

[189]Resolution n. 1511 of 2003, UN Doc. S/RES/1511 of 16 October 2003.

[190]The operation in question was envisaged by Security Council Resolution n. 1511 of 2003, The situation between Iraq and Kuwait (UN Doc.S/RES/1511 of 16 October 2003): "(…) authorizing "all necessary means", would not have consented to the implementation of extrajudicial detention measures. This possibility found a more explicit recognition in the next resolution n. 1546, which referred to the text of the letter from the US Secretary of state, in which internment for imperative security reasons was expressly indicated among the measures that could be implemented (Resolution 1546 (2004) Adopted by the Security Council at its 4987th meeting, on 8 June 2004, UN Doc. S/RES/1546 (2004) of 8 June 2004).

control over the conduct by the United Nations neither by virtue of the criterion of "ultimate control" nor of "effective control", imputed the same to the United Kingdom, the sending state of the troops, declaring, through the "distinguishing" technique, that the matter in question, unlike the Behrami case, was part of the context of a force mission authorized but not established by the Organization (...)"[191]. This type of decision was also based on the application of other national courts according to the criterion of double indictment and conduct according to the state of dispatch of the troops. We also refer to this in the cases of the Dutch courts: Nuhanović and Mustafic v. The Netherlands (Ryngaert, Spijkers, 2019)[192], followed by the Mothers of the Srebrenica v. The

[191]The Court on this occasion, citing the art. 7 DARIO as adopted: "(...) in the first reading by the ILC and some passages of the related Comment, could conclude that (…) the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant's detention was not (…)".

[192]Supreme Court of the Netherlands, the Netherlands (Minister of Defense and Minister for Foreign Affairs) v. Hasan Nuhanović, ruling of 6 September 2013, ILC 2061, which confirmed, in essence, the sentence of the Hague Court of Appeal of 5 July 2011, in reform of the decision of the District Court of 10 September 2008, ILC 1092, par. 4.8. See also from the ECtHR the cases: Finogenov and others v. Russia of 20 December 2011 and Hassan v. The United Kingdom of 16 September 2014, par. 103.

Netherlands case (Klabbers, 2015; Papa, 2016; Van Der Have, 2017; Gasseling, 2017; Ryngaert, Spijkers, 2019; Ryngaert, Istrefi, 2021; Morris, 2022)[193], based on the same historical facts, but having a broader interpretative scope. According to the court: "(…) the conduct of Dutchbat was to be attributed to the Netherlands due to the effective control exercised by it, on the basis of a bidirectional interpretation of Art. 7 DARIO together with Art. 48. Indeed, rather questionable is the responsibility of the sending state of the contingent, in the opinion of the court. This should derive from the fact that it has retained the authority in disciplinary matters, as well as the criminal jurisdiction towards its own soldiers who have contravened orders of the United Nations, a circumstance which should have allowed the Dutch state to prevent the occurrence of the events in Srebrenica. The Dutch decisions highlighted the power that the state had to give

[193]District Court of The Hague, Mothers of Srebrenica v. The Netherlands, case no C/09/295247/HA ZA 07-2973, decision of 16 July 2014. It should be noted that the appeal was originally presented by the association against the UN to see the civil responsibility of the organization recognized, but the Dutch courts had denied this request, relying on the rules on the immunity of the Organizations. From this case the controversy arose before the judges of Strasbourg on which we will return shortly (European Court of Human Rights, Stichting Mothers of Srebrenica and others v. The Netherlands, appeal No. 65542/12, decision of 11 June 2013).

orders to its troops, so that they did not actually carry out the accomplished acts. Not only the power to give orders, but also the legal and factual power to prevent the occurrence of the offense has been included in the notion of "effective control" (Larsen, 2008; Dannenbaum, 2018)[194].

Dutch decisions followed the path of double attribution of conduct (Momirov, 2012; Direk, 2014). Position that we also see in the Jaloud[195] case concerning an incident which occurred following a shootout triggered between a vehicle and a checkpoint manned by Dutch soldiers stationed in the Basra region and operating within the framework of the mission of the international stabilization program for Iraq, established by the Security Council with the Resolution no. 1483 of 2003 (Rainey, Wicks, Ovey, 2021). The Strasbourg judges supported the thesis of the double attribution of the conduct as a type of reflection of the double organic role of the agent[196].

---

[194]Which is affirmed that: "(…) when orders are contravened, the relevant levers of control over the conduct are those that impact discipline and obedience to lawful commands. Because in peacekeeping forces those levers are held exclusively by the state, it is the state that has the control most likely to be effective in preventing wrongdoing that contravenes UN orders (…)".

[195]ECtHR, Jaloud v. the Netherlands of 20 November 2014.

[196]"(…) The facts giving rise to the applicant's complaints derive from alleged acts and omissions of Netherlands military personnel and

What happens in the case of extraterritorial jurisdiction of states?

The possibility of attributing conduct outside its national borders to a state does not autonomously mean its own jurisdiction over the situation in question. The attribution of the conduct and the exercise of jurisdiction by the state are very distinct issues at a logical and legal level given that the subjective element of the offense and the objective element such as the exercise of jurisdiction constitute a prerequisite applicable to the obligation at the head of the state[197].

The existence of the jurisdiction of the states appears to be a

investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention (...)", ECtHR, Jaloud v. The Netherlands of 20 November 2014, par. 155.

[197]Although the same Court has not always properly distinguished the two profiles, the autonomy of the two phenomena must certainly be recognized. Lastly, see Catan and others v. Moldova and Russia of 19 October 2012, par. 117-118 "(...) is concerned with a different question, namely whether facts complained of by an applicant fell within the jurisdiction of a respondent state within the meaning of Article 1 of the Convention. As the summary of the court's case-law set out above demonstrates, the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a state's responsibility for an internationally wrongful act under international law (…)".

complex and problematic operation given that the offenses committed in the context of forceful actions occur in a solitary manner in areas distant from the own territory of the states where the conduct is contested. As already Art. 1 of the Convention states and requires the contracting states "(...) to guarantee the conventional rights "to any person within their jurisdiction", it is then necessary to demonstrate the extension of state jurisdiction in an extraterritorial sense (...)" (Milanovic, 2011; Rainey, Wicks, Ovey, 2021; Sudre, 2021; Villiger, 2023)[198]. Thus the spatial model and what happens to an individual or a group of individuals is a "personal" model (Wilde, 2005). The "spatial" model was in fact considered "(...) also applicable to cases of jurisdiction in extremis, i.e. in relation to areas of modest size, on the basis of the control exercised over well-defined portions of territory (...)"[199]. As regards the personal model, it has instead been divided: "(...) into two further variants: on the one hand, situations of de facto control over one or more individuals ("de facto control over a person"), on the other, situations of "regulatory" control ("authority or de jure control over a person") (…)"[200].

[198]The notion of state jurisdiction in the treaties on human rights, and in particular of extraterritorial jurisdiction, deserves a discussion on its own, as demonstrated by the various existing monographic studies on the subject.

[199]ECtHR, Medvedyev and others v. France of 29 March 2010, parr. 66-67.

[200]ECtHR, Medvedyev and others v. France of 29 March 2010, par. 67.

State jurisdiction that has been exercised in an extraterritorial sense due to the operations established or authorized by the organizations is identified in an evolutionary line from the Banković case, passing through the Al-Jedda and Al-Skeini cases (Miltner, 2012)[201] and arriving at the Hassan (Amos, 2017)[202] and Jaloud[203] (Boutin, Nedeski, 2020; Rainey, Wicks, Ovey, 2021).

In the Banković case, concerning the bombing of the Radio Televizije Srvije building by a missile dropped by NATO air forces in 1999, the Court stated that: "(...) adopted a rather restrictive vision of the territorial scope of application of the

[201]See the concurring opinion of judge Bonello in the Al-Skeini case, par. 12: "(…) when it is within a state's authority and control, whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that state had authority and control, but, ah no, it had no jurisdiction (…)".

[202]"(…) as the court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part", ECtHR, Hassan v. the United Kingdom of 16 September 2014, par. 77.

[203]According to Boutin and Nedeski: (…) a formalistic distinction between the two sets of ILC Articles amounts to a severe oversimplification. In scenarios where both a state and an international organization are involved, the ARIO can be directly relevant for the determination of state responsibility (…)".

Convention, evoking the idea of a "espace juridique européen", i.e. a space confined exclusively within the regional area delimited by the borders of the contracting states (…)" (Lawson, 2004; Rainer, Wicks, Ovey, 2021)[204]. In the Behrami case the Court: "(...) rule on the problem of applicability ratione loci Winner, captured by the French navy". This case was subject to the jurisdiction of France since the state had "full and exclusive control over the Winner and its crew" (Rainey, Wicks, Ovey, 2021). Thus, the Court vacillated between the "personal" model based on control over the crew and the "spatial" one"[205] where the

[204]ECtHR, Bankovic and others v. Belgium of 12 December 2001, par. 57.

[205]ECtHR, Cyprus v. Turkey of 26 May 1975 and Loizidou v. Turkey of 18 December 1996, parr. 52, 56 and 62: "(…) bearing in mind the object and purpose of the Convention, the responsibility of a contracting party may also arise when as a consequence of military action-whether lawful or unlawful-it exercises effective control of an area out-side its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (…) recalls in the first place that in its above-mentioned Loizidou judgment (preliminary objections) (…) it stressed that under its established case-law the concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the contracting states. Accordingly, the responsibility of contracting states can be involved by acts and omissions of their authorities which produce effects outside their

Court stated that: "(...) the responsibility of the contracting party may also arise when as a consequence of military action-whether lawful or unlawful-it exercises effective control of an area outside its national territory (…)". In the Al-Saadoon and Mufdhi v. United Kingdom case, the Court "(...) progressively moving away from the solution that emerged in the case concerning the NATO

own territory. Of particular significance to the present case the court held, in conformity with the relevant principles of international law governing state responsibility, that the responsibility of a contracting party could also arise when as a consequence of military action-whether lawful or unlawful-it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (…)" It is not necessary to determine whether, as the applicant and the government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (…) that its army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" (...) those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (…). Its obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus (…)".

bombings (...)" (Rainey, Wicks, Ovey, 2021)[206].
With the Al-Jedda[207] and Al-Skeini (Milanovic, 2012)[208] decisions the Court showed: "(...) to have overcome the controversial legal principles of the Bankovic decision (…)". In the Al-Skeini case- concerning the appeal presented by six Iraqi citizens for the death of their relatives, caused by the British armed forces in some anti-

[206]ECtHR, Al-Saadoon and Mufdhi v. United Kingdom of 3 July 2009. In the present case the Court attaches importance to the fact that the British authorities exercised total and exclusive control over the detention facilities where the applicants were held. Note how the departure from the principles expressed in Bankovic was already traceable in the various appeals lodged against Turkey, including the Issa v. Turkey, Pad and others v. Turkey and Isaak and Others v. Turkey (ECtHR, Issa v. Turkey of 16 November 2004), Pad and others v. Turkey of 28 June 2007, Isaak and Others v. Turkey of 28 September 2006 cases.

[207]House of Lords, R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent), sentence of 12 December 2007: "(…) is interesting to note that the British judges have explicitly referred to the DARIO Project. It was common ground between the parties that the government was issued by the International Law Commission in Article 7 of its Draft Articles on the Responsibility of International Organizations. On that occasion, applying Art. 7 of the Project and therefore the criterion of effective control foreseen therein it was established that the (alleged) damaging conduct was attributable not so much to the UN as to the British contingent. The British judges had in fact held that: "It could not be said that the United States had been under the effective command and control of the

terrorism operations which took place in Iraq in 2003-the Court held that the United Kingdom had exercised "public powers" as well as control and authority over individuals (therefore according to the personal and non-spatial model) (...)"[209]. Instead, in the Al-Jedda case according to the dissenting opinions of judges Rozakis and Bonello, who adopted a functional test to ascertain the

UN, or that the United Kingdom were the Court also ruled on the same case (…)". Bikes v. Ministry of Defense (Court of Appeal, Queen's Bench Division, Decision of 7 April 2004): "(…) concerned civil redress for the conduct of the British contingent serving in Kosovo, under the cover of the UN mission. In this circumstance the attribution of the conduct to the UN has never been called into question "(t)he Crown retained command of the British forces notwithstanding that they were acting under the auspices of the U.N. (…)".

[208]ECtHR, Al-Jedda v. United Kingdom of 12 November 2007; Al-Skeini v. United Kingdom of 7 July 2011.

[209]"(…) it can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the interim government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, (…) exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the

jurisdiction of the states, which overcomes the dichotomy between the "spatial" and "personal" models "(...) the jurisdiction of the states would exist whenever they exercise one of the five functions in which respect for conventional rights is expressed: abstaining from direct violation through their agents, preventing violations by of third parties, investigate the violations committed, sanction those responsible and compensate the victims (...)"[210].

This is a position that is oriented towards the functional conception of state jurisdiction where "(...) the contracting states of the ECHR that exercise forms of government power with regard to territories not subject to their sovereignty appear to respect the obligations arising by them, to the extent that the exercise of these forms of power is likely to affect the enjoyment of the same rights established by them, asserted from time to time in court" (Klabbers, 2017). Precisely on the "functional" notion of jurisdiction the Jaloud case represents a definitive overcoming of the Banković jurisprudence. The possibility of presenting an

---

Convention" (ECtHR, Al-Skeini v. the United Kingdom of 7 July 2011, par. 149). The ECtHR preferred to refer to: "(...) the "personal" model, and not to the "spatial" one, disregarding to assess whether the United Kingdom had exercised effective and overall control over the area of Basra, in the southern part of Iraq (…)".

[210]ECtHR, Al-Skeini v. the United Kingdom of 7 July 2011, dissenting opinion of judge Bonello, par. 3 and 10.

individual appeal aimed at ascertaining the responsibility of a state that acted within the scope of a military operation established or authorized by an organization. It recognizes its competence ratione personae loci to rule on the case, overcoming the various obstacles relating to the attribution and extraterritorial jurisdiction profile of the state concerned, it remains to be evaluate the repair that can actually be obtained by the individual (…)" (Klabbers, 2017; Rainey, Wicks, Ovey, 2021).

Adoption of internal measures and obligations of one's participation

The ECtHR also attempted to address the adoption of internal measures by the states which derive from organizations where the internal acts are effective on the national territory of the contracting states, considering the justification of the admissibility ratione personae loci of the appeals as sufficient. In this case the problem is not the attribution of conduct and jurisdiction but the coordination between the Convention and the international obligations deriving from organizations such as the United Nations or the European Union (Condorelli, 2010). From the jurisprudence we have noticed some interpretative lines. First of all, the behavior of the state which is called upon to implement an

obligation that derives from the organization and the possibility of conflict with the Convention without any margin of discretion. Another way is when the state carries out the obligation of the organization which has a minimum margin of maneuver to become implementing.

Absence of margin of discretion and equivalent protection in the relevant jurisprudence

Since international obligations are in conflict with the Convention and the inadmissibility ratione personae of the appeals presented despite the primacy of respect for the ECHR, the ECtHR has presented equivalent protection as a "principle" which is limited to implementing no margin of discretion in the actions imposed by an organization that is not responsible for violations of the ECHR and the organization ensures a certain, precise level of protection of fundamental rights as equivalent to the conventional one. But is it so?

Within this context we remember the related cases from the 1950s and after: Federal Republic of Germany (Lorenz, Groussot, Petursson, 2013)[211], but it is in the M & Co v. Federal Republic of

[211]ECtHR, M & Co. v. Federal Republic of Germany of 9 February 1990: "(…) if a state contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its

Germany case of 1990 made shortly after the historic Solange II ruling of the German Constitutional Court (Hong, 2016)[212] which we saw at an embryonic level the theory of equivalent protection, where the ECtHR played a guarantee role in the system therefore which placed the appeal as inadmissible ratione materiae (Spielmann, 2013; Negrelius, Kristoffersson, 2015; Jakubowski, Wieczyńska, 2016; Lacchi, 2016; Büyükbay, Ertin, 2017; Sudre, 2021; Villiger, 2023)[213]. Leading of equivalent protection was the

obligations under the first treaty it will be answerable (…)".

[212]Solange I and II. This decision, as is known, has overturned the previous Solange I, with which the Constitutional Court: "(...) has claimed the power to review community acts of secondary law in the light of German constitutional principles until (as long as, "Solange" in German) the EU had not guaranteed a system of protection of human rights at least equivalent to the national one. In the Solange II decision, however, the court notes that the observance and protection of human rights guaranteed by the Court of Justice of the European Union was substantially similar to that offered by the German constitutional system (especially with regard to judicial mechanisms). "So long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights (…), the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation (...) and it will no longer review such legislation by standard of the fundamental rights contained in the Basic Law (...)". German Constitutional Court: BverfGE-casw, Solange II, decision n.73, 339 2 BvR 197/83 Solange II, par. f.

[213]ECtHR, Bosphorus case of 30 June 2005 and in the case of Michaud v. France of 6 December 2012.

Matthews case (Rainey, Wicks, Ovey, 2021)[214], where: "(…) the presumption of equivalence did not apply to resulting breach of its obligations under the earlier treaty (…)". The same applies to X v. The Federal Republic of Germany[215], due to the margin of discretion held by the British State in relation to a community act regarding elections to the European Parliament (...)" (Rainey, Wicks, Ovey, 2021)[216]. The infamous case of Bosphorous has

[214]ECtHR, Matthews v. United Kingdom of 18 February 1999.

[215]The case concerned an execution decree issued by the German Minister of Justice to give effect to a decision of the European Court of Justice in alleged violation of art. 6 ECHR. This gave the Court the opportunity to state that: "(...) the Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless (…) a transfer of powers does not necessarily exclude a state's responsibility under the Convention with regard to the exercise of the transferred powers (...) the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection (...)", see from the ECtHR the M & Co. v. Federal Republic of Germany case of 9 February 1990, par. 138 and 256.

[216]"(…) The act in question, relating to the direct elections to the European Parliament of 8 October 1976, excluded the citizens of Gibraltar-and among them Mrs Matthews-from the right to vote. After this decision see also the European Court of Human Rights, Senator Lines GmbH, the 15th Member of the European Union of 10 March 2004, where the responsibility of the fifteen states of the Union was invoked following the decision of the European Court of Justice which rejected the request of the applicant to suspend the

perfected in the Court of Justice of the European Union the theory of equivalent protection which has been perfected in its own aspects (Ryngaert, 2011). This was a case of a chartered Yugoslavian Airlines aircraft by the Turkish company Bosphorus Airways. In the same spirit was the implementation of a European Union regulation[217] where in reproduction of a Security Council resolution (Kolb, 2017)[218] it (...) ascertained the absence of a margin of maneuver for the Irish authorities in the application of the European Union regulation, confirmed some principles developed by previous jurisprudence[219], enshrining the principle

obligation to pay a penalty imposed by the European Commission. However, the dispute did not continue, as the Court of First Instance withdrew the fine and the applicant consequently lost the status of "victim" of the alleged violation of human rights (…)".

[217]Regulation CE Concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), No. 990/93 of 26 April1993.

[218]Resolution of Security Council of the UN concerning Bosnia and Herzegovina, UN Doc. S/RES/820 (1993) of 17 April 1993, par. 24.

[219]"(...)state action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides" (ECtHR, Bosphorus v. Ireland of 30 June 2005, par. 155).

according to which the state which limits itself to implementing the obligations deriving from an organization equipped with equivalent protection does not incur violations of the Convention (Kolb, 2017). The case just cited represents a respectful evolution in previous jurisprudential cases arriving at the "equivalence certification" which has been recognized for an organization which can be denied based on a double verification, i.e. the first, of a general and abstract nature which consists in the relative evaluation of the overall level of protection of human rights ensuring the organization a certain interest and the second, of a specific, precise nature which has to do with the evaluation of the measures adopted in the specific case in order to ascertain that the protection of human rights has not been manifestly lacking in the present case. In the context of the EU we recall the Michaud case[220] where the application of the presumption was held taking into account the margin of discretion held by the states as we also saw in the Avotiņš v. Latvia case (Marguery, 2017; Jelinić, Knol Radoja, 2018)[221].

In our interest, the relevant presumption was extended mutatis mutandis to NATO in the Gasparini case[222], to the European Patent

[220]ECtHR, Affaire Michaud v. France of 6 December 2012.

[221]ECtHR, Avotiņš v. Latvia of 23 May 2016 and see also: Gasparini v. Italy and Belgium of 12 May 2009.

[222]ECtHR, Gasparini v. Italy and Belgium of 12 May 2009.

Organization in the Klausecker case (Jakubowski, Wierzyńska, 2016)[223], to the International Olive Council in the Lopez case and to other organizations. The Court was called upon to verify: "(…) the level of protection of human rights within the United Nations (…)". The Strasbourg judges avoided ruling on the point in every way. Indeed, with reference to the obligations deriving from Security Council resolutions, the Court has shown a certain deference towards the United Nations. It is worth remembering that in the Behrami and Saramati cases the doctrine of equivalent protection was not applied, preferring, on the one hand to attribute the act in question to the Organization, on the other to recall Art. 103 of the UN Charter of the United Nations (Higgins, Webb, Akande, Sivakumaran, Sloan, 2018; Alland, 2021; Aledo, 2021; Rainey, Wocks, Ovey, 2021).

In the Al-Jedda and Nada cases the Court avoided: "(...) verifying whether the United Nations offered equivalent protection to that

[223]ECtHR, Klausecker v. Germany of 6 January 2015, par. 76. The Court found: "(...) that the plaintiff, being able to participate in the arbitration procedure to settle the dispute with the Organization, had at his disposal the reasonable alternative remedies for the protection of his procedural rights sanctioned by the ECHR (…) having regard to the foregoing, the court considers that, in having been offered the arbitral procedure in question, the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention (…)".

of the Council of Europe, considering that there was room for maneuver for states in the interpretation of the resolutions (…)" (Guggisberg, 2012; Timmermans, 2013; Harris, O'Boyle, Warbirck, 2014; Taylor, 2022)[224]. We have seen a step that has now been taken in the Al-Dulimi and Montana Management Inc. v. Switzerland case trying to resolve the complex mosaic of delineation between relations with the ECHR "system" and that of the United Nations (Hollenberg, 2015; Kadelbach, 2016)[225]. In

[224]ECtHR, Nada v. Switzerland of 12 September 2012, par. 12 and 195; Republican Party of Russia v. Russia of 11 April 2011, par. 126. See also the opinion of judge Bratza, accepted also from judges: Nicolau and Yudkiska. "(...) We fully share the view of the Federal Court that, while Switzerland could not itself proceed with deletion, it could at the very least have transmitted the results of the investigation to the Sanctions Committee and have actively supported the delisting of the applicant. With the benefit of the results of its own investigation, it could also have encouraged Italy, as the state of nationality and residence of the applicant, to take steps earlier than July 2008 to request the deletion of the applicant's name. Such measures were not bound to have met with success. There remained, however, a real prospect that they would have resulted in the deletion of the applicant's name and the restoration of his rights (article 8) at a much earlier stage than eventually occurred (…)".

[225]ECtHR, Al-Dulimi and Montana Management Inc. v. Switzerland of 26 November 2013. Al-Dulimi and Montana Management Inv. v. Switzerland of 21 June 2016, para. 145 and 149; Hämäläinen v. Finland of 16 July 2014, at para. 67; S.H. and others v. Austria of 3 November 2011, par. 94; Paposhvili

theory the case concerns Switzerland's conduct in relation to the implementation of Security Council Resolution 1483 (2003). It "(...) had taken steps to confiscate the assets belonging to the appellants, Mr. Khalaf M. Al-Dulimi and the Montana Management company"[226]. These were the financiers of Saddam Hussein's Iraqi regime. The names of the appellants had been included in the list of recipients of sanctions by the 1518 Committee of the Security Council (the Committee)[227]. Al-Dulimi had challenged the internal acts freezing the assets before the Swiss federal court, which, in the final instance, had firmly refused to examine the merits of the matter. The acts in question were bound to what was established by the Security Council with Resolution 1483, the effectiveness of which was also to be considered prevalent over any other international obligation that

v. Belgium of 13 December 2016, par. 182; Nada v. Switzerland of 12 September 2012, par. 195; Republican Party of Russia v. Russia of 11 April 2011, par. 126. According to the judges of the Grand Chamber "(…) the system applicable in the present case, in compliance with the following form Resolution 1730 (2006), enabling applicants to apply to a "focal point" for the deletion of their names from the Security Council lists, not afford satisfactory protection (...)" (par. 153).

[226]See resolution of the Security Council n. 1483 (2003), par. 23.

[227]The 1518 Committee, created by Security Council Resolution 1518 (2003), replaced the Committee established by Resolution 661 (1990), with which a general embargo against Iraq was imposed.

may be in conflict on the basis of Art. 103 of the UN Charter (Bernhardt, 2002; Aledo, 2021)[228]. Al-Dulimi had then attempted to obtain the removal of his name directly from the Security Council blacklist, first addressing a delisting request to the Committee and then resorting to the intergovernmental mechanism of the Focal Point, in both cases with a negative outcome. The appellants had decided to refer the matter to the Court to determine whether Switzerland, by adopting the measures to freeze their assets without granting a judicial review of the sanction in question, had violated the fundamental procedural guarantees provided for by Art. 6 par. 1 of the ECHR (Rainey, Wicks, Ovey, 2021)[229].

We immediately notice a margin of appreciation on the part of the state which has not applied the Bosphorus solution. Thus the disapplication of the presumption of equivalence with reference to the UN and the verification of the related responsibility of their Member States has not been the subject of a definitive ruling by

[228]As is known the art. 103 gives precedence to the obligations deriving from the Charter of the United Nations with respect to the obligations assumed on the basis of any other international agreement.

[229]In particular, Switzerland was condemned because the absolute refusal opposed by the Swiss courts to the request for revision of the sanction had violated the right of the appellants to judge, pursuant to Art. 6 par. 1 of the ECHR.

the ECtHR (Nedeski, 2022).

State responsibility and margin of discretion

Margin of appreciation and/or room for maneuver are always available to states. Therefore the Court found that it did not interpret or implement organisation's acts in a way that avoided conflict with the ECHR.

The interpretation of the human rights friendly as obligations deriving from organizations has already concerned the Resolutions of the Security Council relating to the use of force and after those which imposed the adoption of targeted sanctions. In reality the suitability of Art. 103 of the UN Charter to ensure tout court the prevalence of the resolutions of the Security Council over the relevant obligations of the Convention requires the ECtHR to try to resolve the potential conflict of a regulatory nature on an above all interpretative level, moving towards a harmonization of the resolutions of the Security Council towards the presumption of its compliance with respect for human rights (Lazăr, 2015)[230].

The negative impact on human rights has been analyzed with the

[230]ECtHR, Al-Jedda v. United Kingdom of 7 July 2011, par. 102.

Kadi case (Larik, 2014; Gasso, Sauron, 2021; Eckes, 2022)[231] much discussed and not a topic of analysis even for now given that the use of hierarchical criteria has been abandoned to resolve conflicts of rules where Art. 103 of the Charter and the notion of jus cogens is a guarantee of due process according to a balance with the need for international security and as a preventive counter-limit to arrive at a conciliation through international obligations that are apparently conflicting (Miko, 2013; Linderfalk, 2020).

Following with the Nada case, the Swiss authorities in implementing Security Council's resolutions imposing sanctions accusing the financing of an Al-Qaeda network. The state retained a certain discretion "(…) which was admittedly limited but nevertheless real (…) in the execution of Security Council resolutions (…)". In the convoluted reasoning of the Court, states

[231]CJEU, CJEU, C-584/10 P, C-593/10 P and C-595/10 P, Commission and others v. Yassin Abdullah Kadi of 18 July 2013, ECLI:EU:C:2013:518, published in the electronic Reports of the cases, par. 134: "(…) should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognizing of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (…)".

should interpret the resolutions in the sense to understand them as implying the existence of a margin of maneuver in the implementation phase, such as to avoid collisions with the rights established by the Convention. This margin would have allowed the defendant state to adopt internal measures tailored to the specific case and respectful of the appellant's human rights (...) (De Wet, 2013)[232]. Switzerland had not (showed that it had) made

[232]ECtHR, Nada v. Switzerland of 12 September 2012, par. 112-113, 196. "(…) The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (…)" referring to the previous case law, the Court held the following: (…) observes that in the case of Al-Jedda (…) it found that the resolution in question, namely Security Council Resolution 1546 (2004), authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq, but that neither Resolution 1546 nor any other subsequent Security Council Resolution expressly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge (…) found, by contrast, that Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, in the Court's view, the presumption that 'the Security Council [did] not intend to impose any

every effort in this sense, using the limited margin of maneuver at its disposal. The state was condemned for not having mitigated the sanctions imposed by the Committee with internal measures that took into consideration the particular health conditions of the applicant, as well as the "geographical" specificity of the case (Rainey, Wicks, Ovey, 2021)[233]. We speak for a systematic harmonization of the international obligations that are imposed on the Al-Dulimi case[234] which has made an overruling that respects the solution proposed by the Chamber unlikely. Already the long time passed for a final decision is only apparent given the lack of

obligation on Member States to breach fundamental principles of human rights (...) was rebutted in Nada, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in Resolution 1390 (…)".

[233]"(…) It should be noted that in the Nada case, Switzerland had been called upon to implement the sanctioning measure of the travel ban against the applicant, Mr. Youssef Nada, suffering from health problems for which it was necessary to travel outside the enclave of "Campione d 'Italia" where he resided. In doing so, Switzerland would therefore have failed to implement the sanctions with suitable acts to respect the principle of proportionality in limiting the rights of the recipient of the sanctions (…)", according to the ECtHR, Nada v. Switzerland of 12 September 2012, par. 195-196).

[234]ECtHR, Al-Dulimi and Montana Management Inc. v. Switzerland of 21 June 2016.

majority adopted[235], as well as the related dissenting opinions[236] which demonstrate that the confirmation of the solution adopted was not so obvious. Without prejudice to the condemnation of Switzerland for the violation of art. 6 par. 1, where the judges' reasoning also partially differs from that of the Chamber in the following fundamental passages. We note the failure to recognize a real conflict of a normative nature between the obligations in question where the use of hierarchical criteria or reference to the theory of equivalent protection is requested[237].

The Grand Chamber considered: "(...) that Switzerland maintained a margin of manoeuvre, if not in the application of the Security

[235]The decision was voted with fifteen votes in favor and two against. However, among the fifteen judges, seven, while sharing the conclusion of the sentence, criticized the reasoning followed and one partially disagreed.

[236]See the opniopns of Pinto de Albuquerque and in the same orientation see also: Hajiyev, Pejchal and Dedov.

[237]ECtHR; Al-Dulimi and Montana Management Inv. v. Switzerland of 21 June 2016, par. 149 and 153: "(...) reference to the application of the doctrine of equivalent protection can be taken in the last passages of the sentence under review. According to the judges of the Grand Chamber "the system applicable in the present case, even in its improved form following Resolution 1730 (2006), enabling applicants to apply to a "focal point" for the deletion of their names from the Security Council lists, does not afford satisfactory protection (…)".

Council resolution, at least in its interpretation[238]. Having fundamentally denied the existence of a regulatory conflict, the Grand Chamber opted for the argumentative model inaugurated with the Al-Jedda case, based on the presumption of conformity of Security Council resolutions with the human rights protected by the Convention and on their harmonious and systemic interpretation in light of the ECHR (…)". Therefore, it contested for having chosen an interpretation of Resolution n. 1483 that was not compliant with the Convention, as it precluded the recipient of the sanction from the possibility of appealing to the internal courts to allow a review of the measures, since it was not expressly excluded from the text of the resolution. It rejected the Swiss government's objection, according to which the indications contained in the resolution to freeze "immediately" and "without delay" the appellants' assets were an obstacle to any judicial review as they did not they left no room for maneuver to the national authorities (Rainey, Wicks, Ovey, 2021).

The judicial review that the national courts had to operate in a de minimis scrutiny as a limit for excluding their own arbitrariness profiles in the adoption of freezing measures. Another novelty concerns the recognition by national courts of the obligation of

[238]ECtHR, Al-Dulimi and Montana Management Inv. v. Switzerland of 21 June 2016, par. 149.

limited control over sanctions centered on the relative respect of the prohibition of arbitrariness as a standard that arises from a balance between: “(...) the need to ensure respect for human rights and the imperatives of protecting international peace and security (…)” (Rainey, Wicks, Ovey, 2021).

Some criticisms of what we looked at and noted above

The implementation of international obligations deriving from organizations poses specific and special problems for states regarding coordination, i.e. a possible conflict with the Convention. There are many criticisms and we have arrived at some affirmative steps so far.

First of all, as an affirmation we can speak for a wide margin of discretion that is recognized by the states. A pronounced principle relating to a state conduct implementing obligations which are imposed by an organization which ascertains the presence of a margin established in the reasoning followed by the ECtHR and which carries out a full scrutiny of state's responsibility under the Convention. If not, we move towards a limit applied by the theory of equivalent protection. Many times criticism of the court's rulings is normal given that the presence of the margin of appreciation held by the states raises many doubts as we have seen

in the Nada and Al-Dulimi cases, as a margin of maneuver which was suitable for allowing harmonization of conflicting obligations. The requirement in the resolutions of the Security Council to freeze immediately and without delay the funds of individuals who are registered on its lists certainly does not leave many alternatives to the states[239]. Whether a judicial review relating to sanctions before national courts is irreconcilable, even in a hypothetical manner, would require many years and perhaps without any result in this regard. On the other hand, the language used in the Resolutions of the UN leaves room for maneuver for the states where they employ them in the regulations of the EU, allowing the relevant prerequisites for a theory regarding equivalent protection to be realized. Of course we clearly speak for a political and less legal response which we see more within the UN context.

[239]In the Al-Dulimi case, the existence of such a margin had been challenged not only by the defendant state but also by France and Great Britain as intervening states. According to the British government "(…) the obligations on states under Resolution 1483 (2003) were clear and explicit, leaving them no room for discretion (...)" (Al-Dulimi and Montana Management Inv. v. Switzerland of 21 June 2016, par. 119). A partially different discourse could be valid for the adoption of the sanction of the travel ban, as the implementation of the same would leave a margin of maneuver slightly wider than the measure of the freezing of funds.

A second affirmative point is the distinction between the profile of attribution and jurisdiction. We have not seen a margin of discretion in the obligation arising from the organization regarding interpretation or implementation where the court has applied the theory of equivalent protection. It has not been clarified whether the reasons for state's conduct as an action of a binding nature to the organization's decision is attributable to the state and not to the organization itself with consequences that this entails in terms of the admissibility of the appeal ratione personae (Hoffmeister, 2006). We say this after reading the dissenting opinion of judge Sajó in the Al-Dulimi case (decided by the Camera)[240], which raised the following point: "(...) considering that, given the absence of a margin of maneuver for Switzerland in implement the resolution of the Security Council, the presumably harmful conduct should be attributed to the United Nations Organization and not to the state (...) was however completely rejected by the decision adopted by the majority of the court which, both in the decision of the Chamber and of the Grand Chamber in the Al-Dulimi case preferred to decide the issue on the merits, in continuity with the Bosphorus jurisprudence, attributing the act in question to Switzerland without clarifying the reason (…)"

[240]See the partially dissenting opinion of judge Sajó in the Chamber's decision and the position supported by the French government, third party in the proceedings.

(Sakara, 2021). It is understood that the Strasbourg judges are limited to the existence of internal measures which are adopted by the national authorities and which entail the existence of the jurisdiction of the state according to Art. 1 ECHR (Villiger, 2023). A reasoning that seems questionable, does not resolve the central issue by superimposing the profile of the accusation of the conduct, i.e. the determination of the appeal ratione personae and the assessment of state jurisdiction pursuant to art. 1 which in reality only determines the appeal ratione loci. The ECtHR did not adequately distinguish the two aspects, i.e. attribution and jurisdiction even in cases where an internal measure is absent (Ryngaert, 2011; Zeegers, 2016)[241].

Thus it seems correct and it is admitted that in cases in which a contracting state limits itself to reproducing with internal measures and without room for maneuver an obligation deriving from the organization, the harmful conduct must be attributed to

[241]"In the Boivin case the absence of an internal measure was considered a suitable element to exclude the admissibility of the appeal ratione personae, whereas in the Gasparini case this circumstance did not assume the same weight, noting, rather, the initial behavior of the state in establishing an Organization (ECtHR, Boivin v. 34 Member States of the Council of Europe, appeal No. 73250/01, decision of 9 September 2008), concerning a labor dispute between an official and the Organization Eurocontol (European Organizaton for Safety of Air Navigation) (…)".

the state and not to the Organization given that the ECtHR clarified its position by referring to the theory of “dédoublement fonctionnel”, as we have seen in the DARIO and with regard to the relevant provisions contained in Chapter VI, entitled: “responsibility of a state in connection with the conduct of an Organization” (Nedeski, Nollkaemper, 2012; Liakopoulos, 2020a; Liakopoulos, 2020c; Nedeski, 2022). Thus it is obvious that one of the weakest points of court's jurisprudence is the failure to attempt to reconcile the relevant solutions with the existing general international law on the subject as a limit that emerges in relation to the development of the theory of equivalent protection.

A third affirmative point concerns the theory of equivalent protection and the lack of comparison with general international law in the area of liability. The theory concerns the pillars on which the approach adopted by the court concerns the responsibility of states connected to acts of organizations stands. Ultimately it is based on and moves towards a radical criticism that challenges the premise of the organization which guarantees a standard of protection of human rights equivalent to the relative protective and conclusive system of the Convention itself. This system of the Convention was created with the task of verifying respect for human rights through the jurisdictional mechanism despite the fact that there are organizations that are not equipped

with structures for the protection of human rights equivalent to jurisdiction[242].

And we say this because equivalent protection comes from the Solange I and II decisions of the German Constitutional Court way back in 1974 and 1986 which worked out to resolve inter-judicial relations between the German Constitutional Court and the courts of the EU. The application of the theory within the UN will be able to be compared through a judicial body which is clearly the court and a political body which is the Security Council. This type of functioning is limited to organizations that have the powers to directly affect the protection of the rights of the individual and based on these powers as was envisaged in the Bosphorus case. The level of protection guaranteed does not necessarily have to be equivalent to that of the ECHR and can proportionally change the powers it effectively exercises over individuals. The organizations applying the theory have not explicitly raised objections and appear to have acquiesced in the solution that was given by the Court. The UN has not done so far or questioned the elements of theoretical assumptions. They tried to resolve regulatory conflicts (Miko, 2013) in a diplomatic way, highlighting the dialogue created with the organization concerned

[242]As the Commentary on the DARIO also recalls, not all Organizations have developed sophisticated structures that allow access to justice for individuals comparable to those established by the Convention.

and the raising of protection standards. The organization concerned protects in an equivalent way the rights of individuals, the conduct of states which are removed from the scrutiny of the court since it has not specified the founding legal bases such as immunity from liability which generates the presumption of equivalence (Rainey, Wicks, Ovey, 2021; Sudre, 2021)[243]. This situation seems to recall the functioning of a circumstance of exclusion from the offense which was provided for in Chapter V of DARSIWA. States have acted in implementation of an obligation that derives from an organization that is equipped with "certification" of equivalent protection and which functions as an exclusion clause from the responsibility of states elaborated as a

[243]According to some authors: "(…) the positive assessment of equivalent protection within the Organization would have the effect of making the jurisdiction ("functional") of the states that have acted under the cover of the Organization act backward. This would justify the effect of exemption from liability caused by the assessment of equivalent protection (…) on the Melchers & Co. C. Germany case, states that: "(…) the ascertainment of the equivalence of protection tends to fill itself with meaning precisely in relation to the importance assumed by the failure of the state concerned to exercise powers suitable to ensure compliance with the rights claimed in court, as a result of the transfer of powers to the Community (…). The positive outcome of this assessment seems to be the limit within which the narrowing of the jurisdiction of Germany, produced by the aforementioned transfer, ends up being considered compatible with the Convention itself (...)".

lex specialis for a conventional system of offenses over which it supervises the court. The functioning of this type of clause deserves to be compared with the existing general international law rules on the matter. However, doubts exist regarding the relationship of the consequences recorded in the scenario when the organization does not offer equivalent protection or offers in general terms and in specific terms which is manifestly insufficient[244]. This type of direct or indirect responsibility of states can be called upon to respond to shortcomings of organizations. The decision did not clarify whether the title of the

[244]"(…) the elements necessary to found an equivalence judgment and the contours of the requirement of "manifest insufficiency", threshold, not better defined below which the automatic exclusion of state responsibility is not realized, are not even clear. On the point judge Ress's competing the opinion in the Bosphorus decision, in which he suggested using as a guiding criterion for the examination on insufficiency manifested the respect that the court of justice would have given in the future to the precedents of the Court of Strasbourg and the jurisprudence of the Court of justice not in general, but rather in relation to the intensity of protection of the specific right guaranteed by the Convention which is believed to have been violated (see Concurring opinion of judge Ress, par. 1-5, in Bosphorus v. Ireland of 30 June 2005) (…) in favor of an assessment in relation to individual cases and not with respect to the general conformity of the system as a whole, under penalty of frustrating the ratio of the mechanism of individual appeals before the Court (…)".

defendant state's responsibility concerns the provisions of the DARSIWA or DARIO, in speciem Art. 61 DARIO which foresees the different combinations that are possible regarding the attributions of responsibility or conduct between states and organizations. In this context we remember the Al-Dulimi case which found solutions on reasoning with other evaluative premises.

A fourth affirmative point concerns the tools for resolving regulatory conflicts. Until today we have not noticed a non-interpretative but concrete clarity regarding the resolution of regulatory conflicts and above all what in the other part we have the ECHR and the obligations contracted by the states according to the VII Chapter of the UN Charter. The Court recognized that when faced with irreconcilable international obligations there are two different options for resolving the regulatory conflict. On the one hand, the hierarchical definition of the relationships between different legal systems as useful tools is the supremacy clause included in Art. 103 of the UN Charter (Kolb, 2004; Zimmermann, Tomuschat, Oellers-Frahm, Tams, Kashgar, Diehl, 2019; Liakopoulos, 2020b)[245]. The notion of jus cogens with the

[245]In argument see from the International Court of Justice (ICJ), Questions of interpretation and application of the 1971 Montreal Convention arising form the aerial incident at Lockerbie (Lybia v. UK, Lybia v. United States) provisional measures, ICJ, Reports of 14 April 1992.

relative prevalence of the mandatory rules of international law on resolutions and the disapplication of the presumption of equivalence give priority to the convention on resolutions. The reference to Art. 103 of the UN Charter is a precluded path given the very harsh and innumerable criticisms that this solution has attracted in the past[246] and in practice it has not been abandoned by the Luxembourg judges (Uerpmann-Wittzack, 2012; Grard, 2013; Beaumont, Danon, Trimmings, Yüksel, 2017)[247].

In particular, in the Al-Dulimi case art. 103 attempted to resolve any regulatory conflicts, as we also saw in the Mothers of Srebrenica case. The Court gave relative priority to the resolutions of the Security Council and to the value of security over respect for individual human rights, avoiding interference with the delicate task exercised by the organization in the topic of the use of force and the fight against terrorism. The objective and function of the reminder preferred and organized by art. 103 is not forgotten and the provision imposes priority on the resolutions where the Security Council has adopted in accordance with the

[246]ECtHR, Beherami and Beherami v. France, Saràmti v. France, Germany and Norway of 2 May 2007.

[247]CJEU, C-190/11, Daniela Mühlleitner v. Ahmad Yusufi of 6 September 2012, ECLI:EU:C:2012:542, published in the electronic Reports of the cases. Joined cases: C-415/05 P, Kadi & Al Barakaat Int'l Foundation v. Council of 8 November 2008, ECLI:EU:C:2008:461, I-6351.

purposes and principles of the UN between figure and respect for human rights[248]. Invoking the principle of ius cogens results in a lack of a firm opinio iuris where the qualification of the majority of rights is sanctioned by the Convention in the mandatory rules of international law, with Art. 6 ECHR to be protagonist (Cannizzaro, 2014; Liakopoulos, 2020b; Rainey, Wiicks, Ovey, 2021)[249].

With the Al-Dulimi case, the future of the disapplication of equivalent protection is uncertain as it was correctly identified as an interpretative tool to make one system prevail over the other[250].

[248]Therefore, in the light of a joint reading of the articles 1 par. 3, 24 par. 2 and 103 of the Charter, the resolutions that deviate from the respect for the purposes and principles of the Charter, within the limits of an adequate balance with the need to maintain international security (the latter's undoubtedly primary end of the Organization), could be considered invalid and therefore to them the effect of the supremacy clause of art. 103.

[249]On this point see also the defense of Italy in the same dispute and in particular the jurisprudence of the Inter-American Court of Human Rights referred to therein (Counter-memorial of Italy, pp. 75, par. 4.94). See also: ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Dissenting Opinion of Judge Cançado Trindade, par. 219 of 3 February 2012.

[250]In this regard it was observed that the difference between the doctrine of equivalent protection and Article 103 of the Charter “would reside more in their respective scope than in their very nature and purpose (...)”.

Thus a second path is traced which is not clarified and explored by the ECtHR itself as a setting of the relationships between the system of the ECHR and the system of the UN. And who wins? It's not a competitive race. In dualistic terms and in terms of an adequate balance of values we recall the theory of counter limits that belong to states and organizations and also enter the signatory states of the Convention as parties that conflict with some rights sanctioned by the Convention itself and which often highlights the access to justice. Thus the ECtHR must qualify the individual provisions of the Convention as counter-limits in a conventional system which implicitly recognizes the existence of illegal profiles in the resolutions of the Security Council and attributes to the qualification of ultra vires acts[251] and on Articles 1, 24, par. 2

[251]ECtHR, Reilly v. Ireland of 23 September 2014, par. 175: "(…) reiterates that whether a person is an agent of the state for the purposes of the Convention is defined on the basis of a multitude of factors, none of which is determinative on its own. The key criteria used to determine whether the state is responsible for the acts of a person, whether formally a public official or not, are as follows: manner of appointment, supervision and accountability, objectives, powers and functions of the person in question (…)". Same spirit of orientation in cases: Kotov v. Russia of 3 April 2012, par. 107-108: "(…) the respondent state cannot be held directly responsible for his wrongful acts in the present case. The fact that a court was entitled to review the lawfulness of the liquidator's actions does not alter this analysis (…) must, however, also examine whether the respondent state breached any positive obligations in

and 103 of the UN Charter. The ECHR system is an autonomous planet from other legal systems which is placed even more so and with great delicacy in today's international law[252]. The dualistic path is not so easy to follow. The final result leads to a surgical application of international law which conflicts with the will of states parties to the ECHR[253] and that of the ECtHR which has repeated many times that the Convention is an application tool

---

the present case (…)". V.K. v. Russis of 7 June 2017. Chernega and others v. Ukraine of 18 June 2019; parr. 126, 128-132.

[252]A closer look in the Al-Dulimi decision of the Grand Chamber, the Court seems to use, in part, the technique of balancing values, but only in identifying the standard of review of resolutions by internal courts (ie the control of a possible arbitrariness of the sanctions).

[253]"(…) the Swiss government in the Al-Dulimi case warns the Court from adopting solutions that: "would result in a dissociation between the different international systems, with the risk that the inability of states to fulfill their obligations according to the respective systems might lead to a weakening of those obligations, whose binding force might no longer be perceived in the same manner (...)that would have the combined effect of minimising the importance of the operations imposed by the Security Council resolutions under Chapter VII of the UN Charter in order to preserve international peace and security, of encroaching upon the exclusive competence of the Security Council as a political decision-maker, and also of weakening the authority of the judgments of the European Court of Human Rights itself (...)" (ECtHR, Al-Dulimi and Montana Management Inv. v. Switzerland of 21 June 2016, par. 111).

integrated with other obligations of international law applicable to Member States[254]. The constraints that lead the different tools to resolve regulatory conflicts, i.e. the hierarchical approach, the disapplication of equivalent protection, the dualistic approach which is operated with the balancing technique puts the ECtHR as a judge leading to deny the roots and the existence of a conflict between obligations, thus forcing increasingly harmonizing interpretations.

A fifth statement concerns the arbitrariness of a new standard that emerges from this type of protection. Already from the Al-Dulimi case we have seen an orientation of an interpretation that strives towards the systematic nature of the Security Council by recognizing the relative legitimacy of national judges to scrutinize the content from the point of view of arbitrariness as a standard that results from the relative balance that goes back between "the need to ensure respect for human rights and the imperatives of protecting international peace and security"[255]. Did the Court not specify what the standards consist of? Perhaps because

[254]"(…) as the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part (...)", ECtHR: Hassan v. the United Kingdom of 16 September 2014, par. 77.

[255]ECtHR, Al-Dulimi and Montana Management Inv. v. Switzerland of 21 June 2016, par. 146.

arbitrariness and abnormal defects resort to the terminology that is closest to administrative law towards the nullity of an act due to the lack of its essential elements such as macro deficiencies, omissions, errors in proceeding and in facto, oversights or cases of homonymy, error frequent in committee practice. This parameter of arbitrariness verifies the correspondence between the names that are included in the sanctions lists and the identity of the appellants, as well as the belonging of the frozen assets also to obtaining the relevant information in this regard which excludes comparable judicial control as we have seen in the Kadi II case[256]. Within this context, the international standard of the Ombudsperson who participates in the sanctions committee for individuals is associated with Da'esh and Al-Qaeda but has not

[256]"(…) the degree of judicial control over the sanctions referred to in the Al-Dulimi decision does not seem to come close to the full judicial review supported by the European Court of Justice in the Kadi II case (see Commission, Council, United Kindom v. Yassin Abdullah Kadi, op. cit., par. 111-112 and 134: "(…) in conducting its own scrutiny on the disputed sanctions, considers, among other things, that it must have access to the information and evidence that substantiate the reasons underlying the adoption of the sanction, verifying "the material accuracy of the facts inferred in court in the light of such information or elements and assess the probative value of the latter according to the circumstances of the case and in the light of any observations presented in this regard, in particular, by the person concerned (...)". (par. 124).

been specified[257].

A sixth statement is based on the failure to take into account the behavior of governments within organizations and their role. Two paths of thought are identified. On the one hand, we observe the absence of coordination between the national and international levels as seen in practice through the Al-Dulimi case. The verification by national courts of the arbitrary nature of a sanction also involves the relative coordination between the judicial decision and the action of the executive body which cancels or modifies the internal provision of the measure. Obviously this is not a question of a precise modification of the sanction also adopted on an international level. We also do not exclude the case in which a court must ascertain the arbitrariness of a sanctioning measure which does not follow the cancellation or relative modification of the sanctions also in the list of the relevant committee, thus creating serious profiles of international responsibility of the state for the failure or exact compliance with the Resolutions of the Security Council and as a consequence the conduct of its judicial bodies (Tzanakopoulos, 2011). The

[257]According to the procedure: "(...) adopted by this body the inclusion (and maintenance) of a name in the lists is legitimate if there is sufficient information to provide a reasonable and credible basis for listing (...) the procedure used by the Ombudsperson of the Sanctions Committee against individuals associated with Da'esh and Al-Qaida (…)".

annulment or modification through a possible decision can impose the sanction that does not prevent another Member State of the UN from adopting the same measures in relation to the assets present in its territory, as well as the possibility of the judges of the second state deciding on the arbitrariness of sanctions with a different way than that of the first.

The ECtHR also clarifies incidentally that states parties to the Convention ascertain the actual arbitrariness of a sanction which is prompt, timely upon the orders of the committee with the aim of canceling the registration. This would avoid other contradictory behaviors between the executive and judicial powers at the national and international level.

A second avenue not explicitly and clearly addressed by the ECtHR concerns the positive behavior of government representatives before organizations and the pressures they must exert. From this perspective and according to the listing and delisting procedures, they are useful for ruling on the behavior of the contracting states through their judges and their representatives, within the international organization and in the permanent missions of states to the UN. Already in the Al-Dulimi case the ECtHR has: “(...) assessed more carefully the behavior of the defendant state in relation to the following aspects: to what extent the state concerned has used every reasonable effort to

make procedural improvements to the functioning of the Committee[258] (…); to what degree was it involved in the decision-making processes that led to the inclusion of the name in the lists; whether and to what extent it was interested in the appellants' case and proposed and/or supported a delisting request to the Committee, including through the intergovernmental mechanism of Focal Point[259] (…) clarify the possible existence of an obligation for the states parties of the Convention to take action within the Sanctions Committees, i.e. within the framework of the existing procedures to protect the individual concerned, in order to obtain the cancellation and/or modification of the restrictive measures, according to a scheme that recalls the exercise of

[258]"(…) Switzerland, condemned twice by the Court, despite being a member of the United Nations only since 2002, is part of the group of so-called Like Minded States (which also includes Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden), which presented concrete proposals for changes to the procedures followed by the Committees to make them more respectful of procedural guarantees (see lastly the document filed on 12 November 2015 Proposal to the United Nations Security Council by the Group of Like-Minded States on targeted sanctions (…)".

[259]In the Al-Dulimi case: "(…) the Swiss government (through its permanent mission to the United Nations), with a letter dated 5 November 2004 addressed to the presidency of the 1518 Committee, had supported the applicant's first request for delisting (…)".

"diplomatic protection" (…)" (Rainey, Wicks, Ovey, 2021; Sudre, 2021).

The above statements and considerations clearly highlight the limits of decisions that require states to fill the relative protection gap inherent in the regime of the targeted sanctions at a national and international level. The ECtHR evaluates the conduct of states party to the Convention and not of international organizations, believing that this limit does not prevent it from taking a stronger position with respect to the positive behaviors required by governments and in intergovernmental forums.

Immunity of international organizations. Responsibilities and conduct

The hypotheses of responsibility of the contracting states are called upon to respond to the conduct adopted internally and connected to the activities of the organizations. The lack of internal measures to implement the obligations deriving from the organizations remain under discussion under two groups of decisions. The first concerns the responsibility deriving from membership, i.e. the belonging of states to an organization and the second to the recognition of the immunities of organizations after

the work of internal courts[260]. This is how the decisions of national judges that recognized the immunities due to organizations are evaluated (Reinisch, 2000)[261]. This is a classic and old phenomenon that concerns labor disputes that arise between organizations and their employees and the illegitimate treatments generally instituted before the judges of the place where the organization in question is based (Dominice, 1999). This refers to a huge number of claimants who obtain compensation for civil damages and as a result of the UN's failure to prevent very serious violations of fundamental human rights as in the Mothers of Srebrenica case, violations due to negligence as in the Georges case before US courts and the spread of the epidemic in Haiti both on a large scale (Garcin, 2015; Maddock Dillon, Dexter, 2016)[262].
The immunities of organizations bring into question several theoretical issues that are exclusively about the recognition of immunities without individuals offering an effective remedy for the violations suffered. It is a wide-ranging topic regarding the

[260]This last hypothesis of responsibility derives from a fact (the recognition of the immunities of the organizations) which remains in any case internal to the state concerned, which is why it is analyzed in this section, differently from the other hypothesis of responsibility.
[261]International Law Association, Final report-Berlin Conference (2004), Accountability of International Organisations.
[262]Georges v. United Nations, 834 F.3d 88, no. 15-455 (2d cir. 2016).

immunities recognized to foreign states and the negative impact on human rights in the conventionally recognized procedure. These are two different immunities. In the case of organizations, immunities are functional to the independence and autonomy necessary to pursue institutional goals and their proper functioning. As far as states are concerned, these rules are the reflection of state sovereignty. All this does not remove the recognition of immunities and in both cases a significant limitation of the individual's rights is determined. The recognition of immunities for states and organizations appears to be a modern conception of international law which valorizes the individual interest which respects the inter-state one when there are no other remedies available in relation to victims who have suffered serious violations in the sector of fundamental rights of international law (Dreysse, 2021).

A complex topic as it highlights the tension felt between a vision of international law and a less conservative one from the past. The area of competence traces the point of balance between two contrasting forces. It limits itself to reconstructing the answers given by the ECtHR in light of the system of the convention, especially on the path of equivalent protection.

Equivalent protection and recognition of immunities are two logical paths that are represented in the famous decisions of Waite

and Kennedy and Beer and Reagan v. Germany (Rainey, Wicks, Ovey, 2021)[263]. These are cases where the legitimacy of the decisions relating to the German courts had granted immunity to an international organization (the European Space Agency-ESA), concerning a dispute having to do with the employment relationships of its non-official staff. The ECtHR attempted to resolve a regulatory conflict between rules on immunity and those on the protection of procedural rights, discarding the possibility of applying the relevant hierarchical criteria to resolve regulatory conflicts which sought a compromise between two opposing needs which are based on the application of the proportionality test and the limitation and compression of the procedural law in question. The principle of proportionality restricts the right to appeal to a judge by evaluating the purpose of this limitation, i.e. the good functioning of international organizations as well as the existence of other secondary ways for the appellants to assert their rights. Thus we have ascertained the alternative mechanisms where the court found in the Waite and Kennedy and Beer and Reagan cases given that Art. 6 ECHR had not been violated (Sudre, 2021; Rainey, Wicks, Ovey, 2021; Villiger, 2023)[264].

[263]ECtHR, Waite and Kennedy v. Germany and Beer and Regan v. Germany of 18 February 1999.

[264]"(…) taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on

The principles used are those that are contradicted by the change in jurisprudence as we have seen in the Stichting Mothers of Srebrenica v. Netherlands case[265]. It is a position that has been criticized due to the lack of balancing of interests and for not having clarified the connection with the objective of immunities and the restriction of the right to justice for victims (Dreysse, 2021). According to our opinion the organizations are not hindered by the binding nature of the violated rules therefore the appellants turned to the Strasburg judges to verify the recognition of the immunity of the UN by the Dutch internal courts as a behavior of denial of justice and a violation of Art. 6 ECHR (Sudre, 2021; Villiger, 2023). The legitimate objective that followed the rules on the immunity of organizations: "(...) ensuring the proper functioning of such organizations (...) referred

their access to the German courts with regard to ESA impaired the essence of their "right to a court" or was disproportionate for the purposes of Article 6 § 1 of the Convention (…)" (ECtHR, Beer and Regan v. Germany of 18 February 1999, par. 62-63). Interesting in this regard is the opinion of a judge of the Court who, in a case concerning the immunities of foreign states, called for the mere equivalence of protection, but for the identity of the procedural guarantees granted to the individual (see dissenting opinion of Judge Loucaides in the aforementioned Al-Adsani v. the United Kingdom case, appeal No. 35763/97, decision of November 21, 2001).

[265]ECtHR, Stichting Mothers of Srebrenica and others v. the Netherlands of 11 June 2013.

to the previous Behrami and Saramati, with the consequent recognition of the prevalence of the obligations of UN Charter on other international obligations, pursuant to art. 103 (...) ruled out, however, being able to derive any indication from what was established in the Bosphorus case regarding equivalent protection, since the dispute between the appellants and the United Nations was based on the use of force by the Security Council and on the limits that bind the latter when it acts on the basis of Chapter VII of the Charter (…). With such activities the United Nations intends to pursue the fundamental aim of maintaining international peace and security. The Convention, in the opinion of the Court, could not be interpreted in a manner which subjects the acts and omissions of the Security Council to domestic jurisdiction without the agreement of the United Nations[266]. States, through their own courts, would interfere with the pursuit of the "key mission" of the United Nations and, therefore, with the conduct of its military operations (Rainey, Wicks, Ovey, 2021).

The Court addressed the problem of the existence of an exception to the applicability of the rules on immunity when a jus cogens rule has been violated. This qualification as an imperative norm of the commission of genocide and the rule that requires preventing

[266]ECtHR, Stichting Mothers of Srebrenica and others v. the Netherlands, cit., par. 154.

the commission (Liakopoulos, 2020b)[267], are noted by the Court. Particularly, the Court highlights "(...) that international practice does not seem to attest to this exception (...)"[268].

The ECtHR examined the positions of the appellants regarding the total absence of any type of alternative remedy with the possibility of referring to a judge to assert their claims. The lack of a forum to appeal through the conduct considered by the entities operating in the mission of the UNPROFOR[269] was not ignored. This is a gap attributable to the Dutch state where the appeal to the Netherlands was deemed inadmissible. The ECtHR concluded the immunity recognized by the Dutch courts to the UN, as: "(…) a legitimate purpose and was not disproportionate (...), i.e. as an immunity of organizations and an individual right regarding

[267]ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports, 26 February 2007.

[268]ECtHR, Stichting Mothers of Srebrenica and others v. the Netherlands of 16 July 2014, par. 158.

[269]"(...) the agreement establishing this military force should have provided, pursuant to art. 48, the establishment of a committee responsible for hearing such appeals, but the provision was never implemented, nor was the competent body set up (…) agreement on the status of the United Nations Protection Force in Bosnia and Herzegovina of 15 May1993 (UN Treaty Series n. I-30006), and especially art. 48 which declares that: "(…) any dispute or claim of a private law character to which UNPROFOR (…)".

access to justice. This position also addressed in the Klausecker case as well as the principles of law that emerged from the Waite and Kennedy and Beer and Reagan cases which verified the existence of alternative jurisdictional remedies. Thus it is understood that the ECtHR addressed organizations as well as the UN (Petiteville, 2021).

Failure to protect injured individuals and responsibility of organizations

The assessment of state responsibility due to the failure to adopt positive behavior at an international level and organizations have adopted the ECHR and the control exercised by the court.

On the one hand, the responsibility of the Member States for a behavior adopted within the organization and the lack of insufficient supervision of the organization itself due to the failure to intervene to protect individuals harmed by an attributable offense. Within this circle it is also assessed whether the state is diligently working towards the organization that is responsible for redressing the harm caused to individuals who find their jurisdiction of that state to an existence of a membership relationship between the state and the organization in question. There is a distinction from other cases given that in these cases it

is not possible to attribute the harmful conduct of the organization to the states by way of double attribution as well as exclusively because an internal implementing measure is missing in the obligation deriving from the organization.

A first issue concerns the positive nature of the obligations incumbent on states and the parameter of the necessary diligence verified in compliance, for the purposes of attributing the responsibility of states. The second concerns the assessment of the jurisdiction that the court according to Art. 1 ECHR affirms that: "(...) since in the hypotheses under examination here there is no internal measure suitable for establishing the authority of the state over the individuals concerned, it will be necessary to understand what the connection consists of (...) with the illicit act of the organization necessary for the requirement posed by Art. 1 of the Convention (...) it is possible to anticipate from now on that this issue can be overcome if one adopts a concept of functional state jurisdiction that has long been evoked in doctrine, consisting in the power of states, to affect the enjoyment of the rights enshrined in the Convention (…). States legitimated to intervene against the organization to protect individual interests both by virtue of special rules of the organization would maintain jurisdiction over individuals (such are, for example, the procedures that regulate the drafting and maintenance of sanctions lists), both on the basis of

the rules of general international law (with an action that comes close to a diplomatic protection) (…)" (Sudre, 2021; Rainey, Wicks, Ovey, 2021).

The behaviors required by governments within organizations can be seen from decisions of the court relating to the issue of state responsibility and in the first membership of a certain organization, i.e. membership responsibility as well as the decision-making processes of organizations (Droesse, 2020). Thus the international responsibility of the states according to the behavior that has been held back the organization applies the reasoning carried out to the conduct that puts the permanent representations of the states in position within the framework of the procedures carried out to draw up and maintain the lists of sanctions identified adopted by the Security Council.

The second hypothesis of responsibility concerns behaviors that have to do with states in external relations with organizations which was not actually addressed by the Court. In this case the Court was not called upon to directly review the compatibility with the convention of the diplomatic silence of a contracting state following violations of human rights suffered by individuals subject to its jurisdiction committed by another state and/or organization. The manner of management as well as relations with other subjects of international law are questionable when they

cause direct harm to individuals. The political choices made by states and characterized by a high degree of discretion escape the review of the Court and of the cases as in the internal courts[270].
If it is logical to understand and support that the states under its jurisdiction are the victims of the offenses that are committed by the organization and required to work diligently to make the organization responsible to cease, repair the damage caused by responding to the hypothetical mandatory state intervention in diplomatic protection against the organization.

(Follows) Membership responsibilities

To verify whether the member states of an organization can be held accountable for illicit behavior of an organization itself, it is necessary to extensively adopt the obligations contained in the human rights treaties signed by the states. Conventional provisions that are interpreted as passive behaviors within organizations that involve the repair of the forms and ways envisaged by the different conventional systems in reference. In this case the responsibility is attributed to the states not because of

[270]"(…) the doctrine of the political act is often invoked to support the unquestionability and, by this means, the removal from the jurisdictional control of some deliberately discretionary government policy lines is justified (…)".

the internal productive measures of the organization's act but for the establishment of an organization without a particular system of protection of human rights equivalent to the conventional one.
We recall the Boivin case (Leach, 2011; Green, Waters, 2014)[271] and the European Union in the Connolly case (Rainey, Wicks, Ovey, 2021)[272] where infringements of one's rights enshrined in the Convention are affirmed[273]. An action or omission of the defendant states was not contested and the appeals before the court were presented against all the member states of the organizations and were declared inadmissible ratione personae given that the states had not intervened directly or indirectly and which had led to the decisions that had not exercised their jurisdiction over the appellants according to Art.1 ECHR (Villiger,

[271]ECtHR, Boivin v. France and Belgium and others 32 Member States of Council of Europe of 9 September 2008.
[272]ECtHR, Connolly v. 15 Member States of EU of 9 December 2008.
[273]"(…) it was more precisely a matter of decisions taken by the Administrative Court of the Labor Organization in the Boivin case and by the Court of Justice of the European Union in the Connolly case (…)".

2023)[274]. Continuing with the Rambus (Geiger, Izyumenko, 2020)[275] and Beygo (Ryngaert, 2011; Chukwuemeke Okeke, 2020)[276] decisions which always concern employment disputes between individuals and organizations. In the decisions prior to Kokkelvisserij v. The Netherlands (Rosas, 2014)[277], the appellant: "(...) would have led to a violation of art. 6 of the Convention". He was examined on the merits given that the proceedings before the Court of Justice originated from a reference for a preliminary ruling raised by the Netherlands (...) applying the presumption of equivalence in circumstances in which the intervention of the defendant state was rather limited in scope (consisting precisely in the mere raising of the reference for a preliminary ruling), it marked a first evolution compared to previous jurisprudence which required a decidedly broader "involvement" of the member

[274]The court affirms that: "(…) in the present case the applicant cannot be said to have been "within the jurisdiction" of the respondent states for the purposes of Article 1 of the Convention. The Court finds that the alleged violations of the Convention cannot therefore be attributed to France and Belgium (…)". ECtHR, Boivin v. France and Belgium and other 32 members of the Council of Europe of 9 September 2008).

[275]ECtHR, Rambus Inc. v. Germany of 16 June 2009.

[276]ECtHR, Beygo v. 46 State Members of the Council of Europe of 16 May 2009.

[277]ECtHR, Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. The Netherlands of 20 January 2009.

state (...)"[278].

With the decisions Galić and Balgojević v. The Netherlands[279], the ECtHR clarified that: "(...) the "involvement" of the states necessary to establish the jurisdiction of the Court must be of a certain importance and cannot derive from mere "static" factors, such as the fact of hosting on its national territory the headquarters of an organization from which the presumably harmful act originated (in the case in question it was the United Nations Tribunal for crimes committed in the former Yugoslavia) (...)[280]. In

[278]According to the Boshorus case, op. cit., par. 137: "(...) in the present case it is not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent state on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish state, with the consequence that its complaint about that act is compatible ratione loci, personae and materiae with the provisions of the Convention (…)".

[279]ECtHR, Galić v. the Netherlands and Blagojević v. the Netherlands of 9 June 2009, par. 46.

[280]In the Galić case: "(...) the applicants complained of a lack of judicial protection in the procedures adopted by the United Nations Tribunal for crimes committed in Former Yugoslavia and summoned the Netherlands as a host state to the aforementioned court in its own territory. This last circumstance was not considered in itself suitable to attribute to the Netherlands the responsibility and the appeal was considered inadmissible

the Lopez Cifuentes v. Spain case[281], believing, mutatis mutandis: "(...) that Spain could not be held accountable for the decision taken by the International Olive Council concerning employment relations with the appellant for the mere fact of hosting on its territory (in Madrid) the headquarters of the Organization (…)" (Rainey, Wicks, Ovey, 2021; Sudre, 2021).

A stable point on previous cases is the involvement of the respondent state which demonstrated a conduct adopted on a national level. We recall the Gasparini case where the Court: "(...) effectively introduced a new hypothesis of responsibility of states for defects and structural gaps in the internal procedures of the organizations, in the absence of an internal intervention by the national authorities (…). A NATO official contested that the dispute that took place before an internal Commission of the Organization, regarding an increase in the pension contribution, had taken place according to a procedure lacking the guarantees provided for by Art. 6 ECHR, complaining, in particular, about the absence of a public hearing. The appellant reproached Italy (state of nationality) and Belgium (state of NATO headquarters) for not having adopted the necessary measures to provide the Organization with an internal jurisdictional system compatible

ratione personae (…)".

[281]ECtHR, Lopez Cifuentes v. Spain of 7 July 2009.

with the protection of the rights recognized by the Convention (...) deemed itself competent ratione personae loci to ascertain the responsibility of both defendant states, and then exclude it in light of the presence of an equivalent protection system within the Organization (...)"[282].

In the Gasparini case, the territorial location of the harmful event was irrelevant for the Court according to the requirement of Art. 1 ECHR. It is highlighted that the mere transfer of powers to an organization constitutes a source of autonomous responsibility and by way of omission[283]: "(...) the obligation on states to ensure that the organization of which they are members and to which they have devolved some competences offers equivalent protection of conventional rights. Compliance with this guarantee obligation, however, does not end at the moment of the organization's establishment, but would also continue throughout its entire "life", as the obligation of continuous supervision of its operations (...) has in fact "pierced the veil" of the separate and autonomous legal personality of NATO, to consider itself competent to judge the responsibility of Member States, in the absence of their specific intervention (…)" (Brolmann, 2015).

[282]ECtHR, Gasparini v. Italy and Belgium of 2 May 2009.

[283]ECtHR, Gasparini v. Italy and Belgium of 2 May 2009, p. 4 and 7.

These are guidelines confirmed in the Perez and Klausecker v. Germany (Pasquet, 2021)[284] cases where the appellants accused the defendant state of the related violation of the right of access to the judge as established by Art. 6 of the ECHR relating to labor disputes instituted against the United Nations and the European Patent Organisation. In the Perez case we noted the direct reference to the Gasparini jurisprudence and the confirmation of the hypothesis of responsibility of member states due to the lack of diligent monitoring activity within the Organizations[285]. Germany's responsibility was excluded for the mere fact: "(...) that the decision of the contested Organization had had its effects on German territory (specifically in Bonn, headquarters of the United

[284]ECtHR, Perez v. Germany and Klausecker v. Germany of 6 January 2015, par. 6: "(…) the lack of a dispute settlement mechanism in the [contract], (...) makes the claim of an impermissible violation of the right to a fair trial justified. The above applies unless it must be ruled that the alternatives available to Supreme comply with the standard in the Waite and Kennedy judgments: there must be "reasonable means to protest effectively rights". The District Court concludes that on the basis of the arguments put forward by the parties and on the basis of the documents submitted, it cannot be ruled that a reasonable alternative judicial process is available (…)".

[285]"(…) the point was not then resolved by the Court, which declared itself incompetent to receive the appeal for the failed exhaustion of internal appeals (particularly those before the German Constitutional Court) (…)".

Nations office where the appellant)[286] (…) when transferring part of sovereign powers to an international organization of which they are members, the contracting states have a legal obligation to monitor that the rights guaranteed by the Convention receive within the organization "equivalent protection" to that ensured by the conventional system (…)" (Rainey, Wicks, Ovey, 2021).

In the Klausecker case: "(…) Germany's responsibility was invoked in relation to two conducts: for having granted immunity to the European Patent Organization before its internal courts and for having created an Organization without adequate resolution procedures of labor disputes[287] (...) concluded that the restriction of the right of access to the judge was in this case legitimate[288] (...)

[286]"(…) the challenged act under the jurisdiction of Germany pursuant to Art. 1 of the Convention, referring to the previous Galić and Balgojević v. Netherlands (ECtHR, Perez v. Germany of 6 January 2015, par. 63) (…) that there had been no involvement of the German government, never intervening, directly or indirectly, at any stage in the labor dispute between Mrs Perez and the United Nations (…)".

[287]The same consideration also applied to the existing procedures within the ILO.

[288]The Court: "(…) its own competence since the conduct in question (i.e. the decision of the German judges) had taken place under the jurisdiction of Germany and was attributable to the same, implemented the test formulated in the already mentioned Kennedy decision. The Court thus found that the applicant, being able to participate in the arbitration procedure to settle the

having contributed to creating an organization without adequate procedures for resolving labor disputes. In this regard, the Court excluded that the defendant state exercised its jurisdiction for the sole fact that the headquarters of the organization was located in Monaco and that the decision had been adopted there[289] (...) in the absence of an "intervention" or "involvement" of the German authorities in the labor dispute[290] (…) stated in Gasparini, namely that if the appellant explicitly criticizes a lack of equivalent protection within the Organization, the Court is competent to verify state's supervision of the Organization's work[291] (…) Germany's membership in the EPO and (...) the principles

dispute with the Organization, had at his disposal reasonable alternative remedies for the protection of his procedural rights sanctioned by the Convention. According to the judges of Strasbrugo "[h]aving regard to the foregoing, the Court considers that, in having been offered the arbitral procedure in question, the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention (...)"; (ECtHR, Klausecker v. Germany od 6 January 2015, par. 76).

[289]ECtHR, Klausecker v. Germany of 6 January 2015, par. 81.

[290]ECtHR, Klausecker v. Germany of 6 January 2015, par. 93.

[291]"(…) in Gasparini (…) the Court deducted from the principles developed in the Bosphorus case that, when transferring part of their sovereign powers to an international organisation of which they are a member, Contracting Parties to the Convention were under an obligation to monitor that the rights (…)".

developed in Gasparini case, the Court, however, then excluded any liability on the part of Germany, as the protection offered by the European Patent Organization would have been "equivalent" to the conventional one (…)" (Droesse, 2020; Rainey, Wicks, Ovey, 2021).

The Court, regarding the question of the jurisdiction of the defendant states and the attribution of responsibility for the contested conduct, identifies an involvement of the national authorities in the contested act which exclusively requires the organization of a separate and autonomous personality of the appellants not subject to the jurisdiction of the states. Appeals are called as inadmissible ratione personae[292] and on the basis of the

[292]"(…) the Court recalls that it recently gave decisions in a number of applications where the impugned decision emanated from an internal body of an international organisation or an international tribunal outside the jurisdiction of the respondent states, in the context of a labour dispute that lay entirely within the internal legal order of an international organisation that had a legal personality separate from that of its Member States. It was decisive for the respondent states to be held responsible under the Convention in those cases whether the states concerned had intervened directly or indirectly in the dispute, and whether an act or omission of those states or their authorities could be considered to engage their responsibility under the Convention. If that was not the case, the court considered the applicants not to have been "within the jurisdiction" of the respondent states concerned for the purposes of Article 1 of the Convention and therefore

attribution of the illicit act to the Organization alone[293]. A judgment is generally valid without the presumption of equivalence overcome by proof of a deficiency or omission. It is not surprising that the Court has always found the presence of a level of protection called upon to respond indirectly to the defendant Member States.

---

declared the applications to be incompatible ratione personae with the provisions of the Convention in this respect (...)" (ECtHR, Klausecker v. Germany of 6 January 2015, par. 92).

[293]See in particular the Practical Guide on Admissibility criteria 2014 of the Council of Europe, par. 173: "(…) there are exceptions to the principle that an individual's physical presence in the territory of one of the Contracting Parties has the effect of placing that individual under the jurisdiction of the state concerned, for example where a state hosts the headquarters of an international organisation against which the applicant's complaints are directed. The mere fact that an international criminal tribunal has its seat and premises in the Netherlands is not a sufficient ground for attributing to that state any alleged acts or omissions on the part of the international tribunal in connection with the applicant's conviction (...)". See in this sense the case from the ECtHR: Lopez Cifuentes v. Spain of 7 July 2009, which affirmed that: "(...) the impugned decisions had been taken by an international organisation that was not under the jurisdiction of the respondent state, in the context of a labour dispute that fell fully within the legal authority of that organisation, which had a legal personality distinct from that of its member States, including the host country. Accordingly, the alleged violations of the Convention concerning the disciplinary proceedings within the IOC could not

The existence of jurisdiction and the imputability of conduct overlap in the reasoning of the Court which seems to make the issue fall within the attribution of the requirement imposed by Art. 1 ECHR (Rainey, Wicks, Ovey, 2021). Whether this is due to a conscious presentation of the relevant legal issues as if they were part of the same problem. The court preferred to resolve the issue according to attribution in order not to accept the absence of the jurisdiction of the states that the individuals are present in their territory and recognizes that the individuals are under the complete jurisdiction of the organizations.

In such a case we talk about an applicability of the ratione personae of art. 1 ECHR (Sudre, 2021; Rainey, Wicks, Ovey, 2021; Villiger, 2023). It is a questionable and methodological choice given that it requires the court to exclusively evaluate the existence of the jurisdiction of the states in a spatial sense as an objective element of an offence, jurisdiction being an applicable and objective prerequisite of conventional obligations. The admissibility of an appeal ratione personae depends on the attribution of the conduct and concerns the subjective element of the offense which does not appear to be included in Art. 1 of the Convention. Thus the attribution derives from an implicit rule, i.e. from general international law on torts and the court inevitably

be attributed to the host country concerned (…)".

applied the verification of the responsibility of states for violations of the Convention.

According to the jurisprudence that we see so far, the court has based itself on the fact that states have freed themselves from contractual obligations in terms of human rights and have transferred competences to international organizations[294]: "(…) when Member States access to international organizations, they do not leave their international law obligations at home (…)" (Ryngaert, 2015; Poelle, 2017). The transfer of skills takes place in principle according to the guarantees provided in the conventional system. Thus, responsibility for violation of the ECHR is attributed to the Member State with respect to an exclusive offense attributable to the organization, thus evaluating the involvement and specific interest of the contracting state. If this were not the case, the appeal will be inadmissible ratione

[294]See the Klausecker case which is affirmed that: "(…) the Court is of the opinion that where states establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (...)", ECtHR, Klausecker v. Germany of 6 January 2015, par. 63).

personae even if directed against all the Member States of the organization that adopted the relevant contested act and within the screen constituted by the separate and autonomous personality of the entity (Liakopoulos, 2020b)[295].

The "theory" of involvement that was requested by the court undoubtedly remains when the contracting state adopts on its national territory the relevant measures that reproduce the obligations deriving from membership of the organization. The internal actions of the national authorities are limited[296]. The Court in the Gasparini case and in the decisions that refer to it (Klausecker and Perez) outlined: "(...) another hypothesis of responsibility of states connected to their membership of the organizations (...) the acts contested by the appellants (decisions in the context of labor disputes) were considered to be attributable exclusively to the organization and the "involvement" of the defendant states did not manifest itself, not even in a "minimal" way, at a national level. Their "involvement" rather resulted from the failure to monitor respect for human rights in organizations

[295]"(…) in these cases the objection obtainable from the principle expressed by the International Court of Justice in the Monetary Fund case, according to which a tribunal cannot pronounce in a prejudicial manner on the legal position of an absent subject in the proceedings (…)".

[296]See the ECtHR: Kokkelviserij v. The Netherlands case.

(...)" (Rainey, Wicks, Ovey, 2021)[297].
Court's assessment seems to also extend to cases that have to do with the conduct of the delegates of the states who, through their member organisations, note that: "(...) the two respondent states (Italy and Belgium) had rightly considered, the time they approved the NATO Civilian Personnel Regulations and its annexes, through their permanent representatives on the North Atlantic Council, that the provisions governing the procedure before the Appeals Board guaranteed a fair hearing"[298], seems to judge the behavior of the permanent representatives of states within the Organization (...)". In the Klausecker case, the Court's control was extended not explicitly as in the Gasparini case, but to the Service Regulations which are adopted by the delegates of the member states of the Organization (including Germany), also including the related proposal to initiate arbitration to define the dispute with the appellant.

[297]State "involvement" usually derives from the omissive behavior of states in this peculiar international context. It should be noted, however, that this aspect (that is the failure to supervise the states within the Organizations) must be expressly censured by the appellant in order for the Court to rule on the point.
[298]ECtHR, Gasparini v. Italy and Belgium of 2 May 2009.

Conduct of delegates within an organization and state responsibility

The conventional system of responsibility supervises the ECtHR as a proposed model that also extends to other protection systems.

Talking about state responsibility in this area requires the presence of some conditions:1.A harmful act that has been adopted by the organization must demonstrate an autonomous power of the states that affects individual rights. The appellant thus contests a conduct independent of the delegates of the states within the organization and which considers that an individual right of the appellant has been violated, thus implying a split operation of the complex decision-making processes of the organization with the aim of isolating multiple conducts that are taken into account by the delegates of the states that contributed to the adoption of the illicit act by the organization[299]. Thus the existence of state jurisdiction over the activity carried out by the delegates according to Art. 1 of the Convention (Rainey, Wicks, Ovey, 2021; Villiger, 2023).

The existence of a margin of power maintained by states in the decision-making processes of organizations is a problematic

[299]This will not be possible, for example, in cases where the harmful conduct consists of a decision of a body of the monocratic organization (for example the Secretary of the United Nations), or of experts, in which the representatives of the states have not participated members.

operation and is still an open question by the ECtHR[300]. The Strasbourg judges consolidated the power of states over individuals which is linked to a territorial datum. The appellants are subject to the jurisdiction ratione loci of the state which acted in an activity of the organizations. Territorial activity in cases of adoption of internal measures, extraterritorial and in illicit cases that are committed in the context of force operations. The offenses committed by the delegates are exercised in a way that is not framed by the government's authority as an example of either

[300]"(...) the existence of a jurisdiction of states in relation to the conduct of their delegates within the organizations have not been dispelled in the Gasparini case, where the Court has not justified its competence, nor ratione loci pursuant to Art. 1 of the Convention, nor ratione personae, has it clarified what are the requirements to identify the states that can be agreed, as legitimate passive, by the applicants (…) considered itself competent to judge the conduct of both Italy (the applicant's nationality) and Belgium (host organization), without however clarifying which elements, in fact or in law, are rooted in the exercise of the jurisdiction of the two states and whether this should take place on the basis of different elements for Italy and for Belgium. The position of the two states has therefore been totally equated without further arguments. The opportunity to clarify the point is then missed in subsequent decisions. In the Klausecker and Perez cases, only Germany (headquarters of the organizations involved) was sued, which claimed that the disputed acts should be attributed to the Organization and that the appeal was inadmissible ratione personae (…)".

territorial or extraterritorial jurisdiction as occurs in the context of the organization. A legal space that defines and does not coincide with the territorial borders of the states[301]. It seems reasonable that states in this context exercise over individuals the government powers that define the normative type, such as for example the power to propose the inclusion of a name in the sanctions lists. Identifying the individual portions of authority exercised autonomously by the states is sufficient for the exercise of their jurisdiction over individuals according to Art. 1 ECHR regardless of a territorial connection that the interested parties have. The existence and scope of these powers are retained by states as an assessment of an object of dispute. By evaluating this position, state responsibility is controlled and it is necessary to resolve the problems linked to the reconstruction of the objective and subjective elements of the offence.

2.The conduct must be referable to a state party to human rights treaties. This type of conduct is an operation that does not have

[301]"(…) the fact that the offending conduct of the delegates is localizable in the territory of the state in which the Organization is based does not imply of course that it is this state that exclusively exercises jurisdiction over the positions taken individually by the states within the organizations. Just as it is not relevant that the prejudice suffered by individuals is produced in a certain state, which is often different from the one where the harmful conduct takes place (i.e. the organization's headquarters) (…)".

many difficulties. The fact contested by the individual is not a complex act of the organization but rather is attributable to the state as an organic bond, existing with the relevant representatives who act in the name and on behalf of the state to which they belong. The government delegates act as organs of the organization as a double organic nature, functional and evaluated with reference to the function exercised by the subject and the specific act being contested.

3. The conduct must be contrary to contractual obligations. The objective element of the offense examines the nature and scope of the obligations that are established by the ECHR and which burden the delegates by verifying the attributable conduct that is contrary to the obligations themselves. The negative duties of the ECHR are not highlighted given that an action by the delegate is unlikely to be suitable in a singular and considered way to interfere with a recognized conventional right. Our point of concentration is based on the positive guarantee obligations that can be obtained from an extensive reading according to Art. 1 ECHR. We can say that the delegates of the states are called upon to prevent the adoption of organizational decisions that involve a relative violation of individuals. In case of failure they are required to put an end to the violation itself[302]. In principle, states

[302]"(...) there is a provision in the text of the Convention which explicitly

exclusively decide on the attribution of the organization on behalf of the one acting. Compliance with positive obligations is the central issue that needs to be resolved as the identification of the diligence parameter under the behavior of states considered not to comply with the contractual obligation. Diligence is owed by delegates within the organization which is not addressed by the ECtHR. Thus it is held that the applicable standard is contested in examination which is not of a high level (do everything possible to), or medium (make every reasonable effort required taking into account the subject's position), or too low (avoid arbitrary or manifestly unreasonable behavior). The nature of the primary norm violated is taken into account and the protection of some rights requires states to ensure intense and early protection. The problem is proving the causal link between the omissive behavior of the delegate and the violation of the rights established by the Convention. The complex act adopted by the organization is a

states that states must respect human rights also in the context of intergovernmental cooperation. A different discourse could be valid with reference to the pact on economic, social and cultural rights, whose art. 2 par. 1 provides that "(…) each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate measures (…)".

prodromal delegate of the resolution given that there are decisive behaviors of the representatives of the eligible states, uti singuli considered which produce a violation of the positive obligations of the Convention causing prejudice in the subjective sphere of individuals. As we understand, a conciliation is needed with the responsibility model outlined with the solutions provided by general international law. Let's remember Art. 61 DARIO (Liakopoulos, 2020a) which attributes responsibility to the state that has circumvented an international obligation that abuses the competence of an organization in the context in which the application of the violated obligation is found[303]. The competence attributed to the organization adopts a certain act which is complex given that it is connected with the lack of diligence of the states in the individual phases which leads the organization to carry out an act which from the point of view of the states is certainly illicit.

[303]Art. 60 affirms that: "(…) a state member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of state's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the state, would have constituted a breach of the obligation. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization (…)".

In finis we can say that the identification of profiles of state responsibility for the position within the decision-making process of an organization is a hypothesis that takes into consideration the reference to the vote expressed by the delegates with reference to the direction from the Member States to the decisions taken by economic organizations.

Listing and delisting procedures of the sanctions committees and representations of the UN Member States

The positive obligations that come from conventional rules bind the representatives of the states both in the listing and in the delisting phase. The individual suffers a prejudice resulting from the behavior of the delegates and which the sending state intends to bring before one of the human rights control bodies.

The resolution to include or cancel the name on the lists is the result of a very complex decision-making process and is attributable to the Security Council which in reality splits into various activities attributable to the individual UN Member States. The reasons that justify the inclusion of a name in the lists are unfounded and it is possible to identify some distinct conduct that entails state responsibility, such as: - the designation of a natural or legal person; - the reference to the committee of information

relating to the individual recipient of the measures that determine a different decision of the committee; -that it has not been activated a cancellation request and the right to do so; - to have arbitrarily objected to the delisting of a name proposed by other states, thus preventing the committee from adopting a delisting decision by consensus; -not having submitted a request for exemption if there were reasons to do so.

These types of conduct actually constitute some prodromal fragments and are connected to an illicit decision of the Organization such as the inclusion and maintenance of the name in a list in an autonomous and independent manner from it. The conduct is an expression of a margin of power of states over individuals and is relevant for the purposes of the notion of jurisdiction referred to in Art. 1 ECHR. The permanent representation of a state has a stable impact on the enjoyment of the rights guaranteed by the ECHR: "(...) when it decides to propose the designation of their name on the list, to arbitrarily oppose the cancellation, not to communicate relevant information, or even not to submit a request for cancellation and/or exemption (...) the fact that the harmful conduct is materially carried out outside the territorial borders of these states (more precisely in the headquarters of the United Nations in New York). What matters if the delegates of the states, both when they act and when they do

not act, exercise a significant influence on the prerogatives of individuals who enter for a short time? Within the sphere of power and authority of the government concerned (…) the notion of jurisdiction would not extend to all UN Member States, but exclusively to states that actually have the powers and instruments to affect the rights of individuals based on the special rules established by the guidelines of the Committees. The "regulatory" control exercised through the actions of the delegates of the states also corresponds to a "territorial" control by the state authorities, due to the actual presence of the individual in the territory of the state to which the delegates belong. It could also happen that the individual is in a territory other than the state held responsible for the behavior of its delegates (Rainey, Wicks, Ovey, 2021; Sudre, 2021; Villiger, 2023)[304].

[304]"(…) that an Italian citizen and resident was entered on the list of one of the Committees on the proposal of Sweden, which acted on the basis of manifestly unfounded information acquired by its intelligence apparatus. Let us also suppose that, once the total lack of information material has been verified, Sweden has not subsequently activated itself to cancel the registration. In this case, Sweden, whose permanent representation acted in concrete in the Headquarters of the Committees in New York, exercised for a certain period of time a jurisdiction over the individual physically present in the territory of another state (Italy). This does not exclude, in principle, that even Italy, as a state of citizenship and therefore been entitled to propose a request for delisting, has exercised jurisdiction over the individual in relation

The assessment of state jurisdiction and the related conduct and evaluation show the responsibility of states and the composition of the offense. The conduct that is undoubtedly highlighted to states. Even in the absence of the adoption of a measure on the national territory this is usually carried out by its own body, i.e. the permanent representation at the UN. Thus there is no objection that the representations of states act as bodies of the Organization. The relevant procedures conceive that the permanent representatives express a point of view in their own nationality which thus does not bind the organization especially in the case of delisting to oppose. Proposing or not a request for cancellation refers to the opposition to the cancellation of keeping the committee informed as the result of specific instructions that individual governments have given to their permanent representations which the states are called upon to respond to[305].

to a different conduct (for example, the failure to request cancellation) and may incur violations of the positive rights sanctioned by the Convention, if it is shown that, aware of the absence of registration, it has failed to take action (…)".

[305]"(…) the individual conduct under discussion originates from purely internal activities, such as, for example, information gathered by the intelligence apparatus, reports of judicial processes. From this point of view, it is clear that the behavior of the permanent representations of states commits the responsibility of the state from which they receive instructions and to which they must relate their work (…)".

From an objective point of view, actions and omissions engage state responsibility due to failure to comply with positive obligations[306]. The conduct that we have noted in the previous paragraphs is contrary to the guarantee obligations since they do not prevent the violation of the rights of the Security Council's decision. Through conduct, states highlight and use the margin of power available by directing the decision-making process of the Committees in a manner compliant with the ECHR. The ECtHR will evaluate the behavior of delegates which falls below the required diligence parameter as stated in circumstances which are found to be low. The behavior of the responsibility of Member States can be arbitrary and manifests the unreasonableness of the behaviors held by their delegates and according to the total absence of even minimal effort directing the committees in a manner compliant with the ECHR (Villiger, 2023).

[306]"(…) it seems more difficult to maintain that the conduct of the delegates directly violates the negative obligations deriving from the Convention, as it is unsuitable to interfere, considered individually, with individual rights. The same designation, despite being a positive action carried out by the delegates of the state, does not realize in itself a violation of the law illegitimately restricted by the measure. In fact, the designation proposal until it is voted by consensus by the Committee is not suitable to determine the violation and may not be followed by the final decision of the Organization, which is the act from which the prejudice derives concretely (...)"

(Follows) Jurisprudence of national and international courts and elements in practice

The theory proposed so far which splits the illicit act of the organization to attribute individual illicit behaviors to Member States finds partial confirmation in some cases that we have also seen in the previous paragraphs.

We recall the Gasparini, Perez and Klausecker cases and adding the Ayadi case of the Court of the European Union where it was stated: "(...) a "regional" obligation on EU Member States to promote a request within the Committees of delisting in favor of its citizens or residents if there are no well-founded reasons for keeping the name on the lists (...) of an obligation of conduct (the proposal of-and not the obtaining of-delisting) which is imposed on permanent representations of EU Member States within the UN (...) once the information has been collected and examined, taking into account that the interested parties do not have the right to be heard personally by the Sanctions Committee, EU Member States consulted are required to promptly ensure that the case of the interested parties is presented without delay and in a fair and impartial manner to the said committee, to be re-examined, if this is objectively justified in light of the relevant information provided (...) the choice by the representatives of the states to intervene or not in the framework of the procedure for canceling a

name from the lists is not the result of total and absolute discretion (…). By promoting a request for cancellation within the Sanctions Committees, they fully guarantee the right of access to justice, thus as provided for and interpreted by EU law (…)" (Rainey, Wicks, Ovey, 2021).

The Ayadi case (Ziccardi Capadlo, 2013)[307] allows us to speak for the recognition of a duty of good faith relating to cooperation and the correct functioning of the sanctions system that has to do with the Security Council. The Ayadi case made us understand that the ECHR's duties of diligence: "(...) in addition to respect for human rights resulting from the constitutional traditions common to the Member States of the Union, as established by Art. 6 TEU suggests that the same obligations are imposed at least on the Member States of the Council of Europe (...)" (Rainey, Wicks, Ovey, 2021). Within this spirit, the Nada case which was decided by a Swiss Federal Court shows that the Ayadi decision has an impact on states not belonging to the EU. The ECtHR took into consideration: "(…) the behavior of the Swiss government held before the Committee, stated that Switzerland had the obligation to submit a request for exemption to the Sanctions Committee or, at least, to inform it of the fact that it considered the reasons

[307]GC, T-253/02, Chafiq Ayadi v. Council of the European Union of 2006, ECLI:EU:T:2006:200, II-02139. T-49/04, Hassan v. Council and Commission of 12 July 2006, ECLI:EU:C:2006:201, II-00052.

underlying the designation do not exist, due to the dismissal of the criminal proceedings against Mr. Nada (…)" (Rainey, Wicks, Ovey, 2021). The ECtHR highlighted the mitigation of the harshness of the sanctions given the margin of maneuver it possessed and which did not notify the sanctions committee, therefore: "(...) if the Swiss state had promptly notified the Italian state, the latter would have could in turn have informed the Sanctions Committee of this circumstance and put it in a position to cancel the name (…). The defendant state would instead have limited itself to suggesting (…) the permanent Italian representation at the United Nations, also making him aware that at that time Italy was part of the Security Council (...) the behaviors required by the delegates seem to go well beyond those highlighted so far: even the states not entitled to directly submit a request for cancellation should still keep the Sanctions Committee of the information material in their possession, present if necessary a request for exemption, and even "encourage" the legitimate state to promote the request for cancellation, offering it the necessary assistance (...)" (Rainey, Wicks, Ovey, 2021).

The Strasbourg judges in the Al-Dulimi case decided on similar arguments by attributing responsibility to Switzerland "(...) exclusively for the internal conduct of its judicial bodies and not also for the behavior of the Swiss representatives within the

Sanctions Committee (...)". State responsibility, however, does not emerge only from the conventional system over which the European Court of Human Rights supervises. On the part of the representatives of the governments within the Committees it can also be deduced from the jurisprudence of the Committee for Civil and Political Rights (the Human Rights Committee) (Rainey, Wicks, Ovey, 2021).

In the Sayadi case (Krenc, 2009; Milanovic, 2009; Ciampi, 2011; White, 2011)[308], the appellants, two citizens of Belgian origin, were included on the Belgian proposal on the lists of the 1267 Committee after the opening of a criminal investigation. The Court of First Instance of Brussels had condemned the Belgian authorities: "(…) à demander sous le bénéfice de l'urgence au Comité des sanctions des Nations Unies de radier les noms des demandeurs de la liste et d'en communiquer la preuve aux demandeurs, à peine d'une astreinte de 250 euros par jour de retard, à compter de l'expiration du délai de 30 jours à partir de la signification du présent jugement (…)" (Rainey, Wicks, Ovey, 2021; Sudre, 2021; Villiger, 2023). The national judges: "(...) had confirmed the unfoundedness of the accusations made against the appellants also in criminal proceedings. However, Belgium was

[308]Committees communication n. 1472/2008: Nabil Sayadi and Patricia Vinck v. Belgium, CCPR/C/94/D/1472/2006, of 29 December 2008.

unable to obtain the cancellation of the names due to the opposition of one of the permanent members of the Committee (the United States). The applicants had then addressed a communication to the Human Rights Committee against the United States-declared inadmissible because the respondent state had not ratified the Additional Protocol which recognizes the competence of the Committee to receive individual communications-and against Belgium, which is was held responsible for violating Articles 12 and 17 of the Covenant on Civil and Political Rights (freedom of movement and protection from attacks on honor and reputation) (…)"[309].

In our opinion we reflect on the illicit conduct that is attributed to Belgium, confirming the hypotheses of the responsibility of governments within the organizations which also envisage some new ones. In particular we must say that the hypotheses of

[309]See the dissenting opinion of the judges Rodley, Shearer and Motoc: "(…) although it failed to make the argument explicitly, it is evident that the state party has done what it could to secure the authors' delisting. In so doing it has provided the only remedy within its power". In the same orientation see also the dissenting opinion of judge Shearer: "(…) the state party has tried to secure the authors' delisting. There is no other avenue open to it to correct the mistake that was made. Not can there be a remedy where the state party acted in good faith to discharge its obligations under a superior law (...)" (See: Appendix A, attached a communication).

government responsibility within organizations are also new. The Belgian government is held responsible for having proposed the inclusion of names in the lists prematurely and only after three months of criminal investigations and sufficient information had been collected. Belgium is not considered responsible for the removal of the name from the list given that the material power to impose the relevant removal on the committee is held responsible for the maintenance of the name from the list, as a circumstance which resulted in damage to the image and reputation of the recurring (Jayakody, 2018)[310]. The Human Rights Committee in relation to the request for deletion stated that: "(…) the state party is itself not competent to remove the authors' names from the Sanctions Committee's list, the Committee is nevertheless of the view that the state party has the duty to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal. State party is also obliged to ensure that similar violation do not occur in the future (…)" (Grover, 2012; Bantekas, Oette, 2013)[311]. The Human Rights Committee has required a particularly high standard of diligence from the states

[310]Committee of Human Rights of the UN, Communication n. 1472/2008, Nabil Sayadi and Patricia Vinck v. Belgium, par. 10.13.

[311]Committee of Human rights of the UN, Communication n. 1472/2008, Nabil Sayadi and Patricia Vinck v. Belgium, par. 12 and 13.

parties to the Covenant.

Government behavior in the sector of external relations with organizations

The power of states over individuals does not derive exclusively from their membership with a particular organization, but from the fact that they are sovereign subjects of international law that can act against other subjects such as international organizations. Thus the exercise of the powers that states have in international relations for the protection of individuals comes first. State intervention to protect individuals through diplomatic action allows the calling of various means of a diplomatic, economic and political nature which can be adopted to assert grievances against organizations and which demand the relative reparation. The moment of verification whether the individual requires the adoption of such measures by the state under its jurisdiction lies in the state of citizenship. In human rights treaties a conventional provision imposes on the contracting states the obligation to act on an international level and by any means to protect the people who are subject to their jurisdiction and the rights that are violated by another subject, i.e. state or organization.

Through the Abbasi case, the ECtHR affirmed diplomatic protection from the courts of the United Kingdom on the matter (Juss, Sunkin, 2017)[312], as: "(...) the various openings of an opposite sign registered in practice have not yet crystallized at the point to establish with certainty the existence of an obligation for states to act in diplomatic protection to assert the responsibility of another state or another organization". There is a fundamental difference between violations of human rights by organizations and the traditional cases of "mistreatment of foreigners" committed against citizens by a foreign state. While the former take place in the territory of the state being contested the failure to fulfill positive obligations, in the second case the abuses take place outside the territory (and jurisdiction) of the states called to intervene in cases of offenses committed on the territory of the states. It is precisely the territorial element of the violations to presuppose, until proven otherwise, the existence of a limited "jurisdiction" of the states over the situations being contested, with a consequent greater possibility for the appellants to demonstrate the operation of the positive obligations deriving from the treaties (Rainey, Wicks, Ovey, 2021).

[312]Regina (Abbasi) v. Secretary of State for Foreign Affairs CA (EWCA Civ.) ER (D) 70 of 6 November 2002. According to the British courts: "(…) there were no provisions of the Convention that explicitly required its government to act in diplomatic protection for the benefit of one of its citizens (…)".

In our opinion, the question resolved on an interpretative level is the investigation of the extension of the regulatory scope of positive objectives of a conventional nature deriving from an obligation for states to adopt every reasonable measure for the protection of the rights of people who are subject to their jurisdiction, also including the adoption of diplomatic measures against the person who is held responsible for the invitation to negotiate, the presentation of complaints and requests for redress in the appropriate forums aimed at guaranteeing the enjoyment of the rights established by the ECHR. Court decisions requiring states not to repatriate individuals who are present in the territory of countries where conventional rights are established are thus violated. States are asked to adopt necessary measures for which the diplomatic character prevents the commission of an offense by other states[313].

With the of Ilaşcu and others v. Moldava and Russia and Chiragov and Others v. Armenia of 16 June 2015[314] cases the acts carried out by the separatist regime that was established in the Moldovan

[313]For example in the Tarakhel case: "(…) Dublin of Afghan asylum seekers from Switzerland to Italy, the court condemned the first state for not having requested and obtained from the second adequate insurance and diplomatic guarantees on the transfer of the interested subjects (…)". ECtHR case: Tarakhel v. Switzerland of 4 November 2014.

[314]ECtHR, Chiragov and Others v. Armenia 16 June 2015.

region of Transnistria in relation to which the Court stated that: "(...) the Russian Federation was attributed responsibility for the material violations of the Convention complained by the appellants (articles 3 and 5), on the basis of the "global" control exercised by it in Transnistria, the region where the violations had occurred". With reference, however, to the Republic of Moldova the violation of negative obligations could not be attributed to it, since the state did not exercise effective control of the territory, while maintaining jurisdiction over the appellants (essentially due to their physical presence on the national territory). The Republic of Moldova was called to respond for the violation of positive obligations, or for not having adopted all the necessary measures to guarantee compliance with the Convention. This state would have failed to adopt economic, diplomatic and political measures aimed at the release of some of the applicants detained by the separatist regime. During the negotiations between Moldova and the separatists, no mention had been made of the situation of the applicants and-again in this diplomatic forum-no mention had been made bring forward requests to guarantee them the rights enshrined in the Convention[315]. Such conduct is more attentive to

[315]Which the court has affirmed that: "(…) in their negotiations with the separatists, the Moldovan authorities have restricted themselves to raising the question of the applicants' situation orally, without trying to reach an agreement guaranteeing respect for their Convention rights (…). Similarly,

the applicants' since they would have prevented the violation of the applicants' rights or at least would have put an end to it (Dalacoura, 2001; Petculescu, 2005; Hessbruegge, 2013; Duffy, 2015; Scharf, 2019; Liakopoulos, 2020b; Rainey, Wicks, Ovey, 2021; Sudre, 2021; Villiger, 2023)[316].

How can understand court's control over behavior not observed by

---

the applicants have been deprived of their liberty for nearly twelve years, no overall plan for the settlement of the Transdniestrian conflict brought to the court's attention deals with their situation, and the Moldovan government did not claim that such a document existed or that negotiations on the subject were in progress (…)" (par. 348).

[316]ECtHR, Ilaşcu and others v. Moldava and Russia of 8 July 2004, parr. 310, 349. The Court has however admitted that: "(...) it is not able to indicate the exact content of the diplomatic measures to be adopted, but, nevertheless, to be able to examine the adequacy of those adopted or of their non-adoption, which "(...) in their negotiations with the separatists, the Moldovan authorities have restricted themselves to raising the question of the applicants' situation orally, without trying to reach an agreement guaranteeing respect for their Convention rights (…) the applicants have been deprived of their liberty for nearly twelve years, no overall plan for the settlement of the Transdniestrian conflict brought to the Court's attention deals with their situation, and the Moldovan government did not claim that such a document existed or that negotiations on the subject were in progress (...)". (par. 348). The same objection can also be moved towards the solution proposed by the chambers of appeal of the ICTY in the Tadić and Ilaşcu and others v. Moldova and Russia case of 8 July 2004 by ECtHR: "(...) which has made similar considerations in relation to the problem of the traceability to Russia of the acts put in place by the separatist regime established in the

state authorities in bilateral diplomatic relations with state responsible for the violation. The Russian Federation case has to do with the duty of states to diligently take action against violations committed in their own territory but also attributable to another subject who maintained effective control over a certain area and certain people. The territorial state where the violations

---

Moldovan region of Transdniestria. The ECtHR avoids qualifying the separatist regime as a subordinate local administration of Russia, the applied attribution criterion appears to be the same used in the Loizidou v. Turkey case (…) the argument was developed to argue that in order to attribute to the state the conduct of paramilitary groups, it is always necessary to ascertain that state organs had effective control over the work of these groups. To confirm this thesis, he referred to ICTY ruling in the Hadžihasanović case in which the ad hoc court to establish the responsibility of a Bosnian commander for the crimes committed by a paramilitary group was not limited to finding that this group was based to an act of domestic law formally part of the army of that state but had also ascertained the existence of an effective control over the work of this group. It is not clear how the principle established in this ruling may have some relevance even in terms of attribution for the purposes of state responsibility unless one wishes to support a thesis that appears to be totally unfounded, namely that the quality of body based on internal law not sufficient for the attribution of the conduct of this to the state, being in any case necessary in addition to the existence of a formal link of internal law between the individual or the group and the state, proof of effective control over the unlawful conduct (…). In the same orientation, is the opinion no. 9/1998 of the working group on arbitrary detention of the UN Human Rights Commission (UN Doc. E/CN/2000/4 28 December 1999, par. 11-18) concerning abuses committed in the detention center of Al- Khiam subject to the authority of the army of South Lebanon

of the ECHR occur remains bound to the positive obligations referred to in Art. 1 ECHR (Rainey, Wicks, Ovey, 2021). The territorial state is responsible for preventing the offense and that the violation is verified at the hands of others to put an end to it by resorting to appropriate diplomatic means.

The obligation to protect individuals in their own territories, it is

(SLA) where, for the purposes of a legal qualification of this militia, the Commission traces these offenses to Israel solely on the basis of an overall control of Israel over the military formation in question to regardless of a certain relationship with the specific disputed torts. The criterion of global control can constitute a valid criterion of attribution in relation to the type of situation contemplated in that case. It does not seem able to provide an adequate foundation with respect to other hypotheses in which the behaviour of individuals united to this can be attributed to the state from a factual relationship (…). One can certainly imagine the situation in which a state recognizes as its own a conduct that would not otherwise refer to it to the general rules of attribution. In this case it does not seem that there is need to resort to the notion of attribution to explain why the state is obliged to answer for the conduct in question. The obligation of the state can be seen as the consequence of the unilateral act, by which the state has recognized this as its own conduct. In our opinion, any global control exercised by a state over private individuals should favour the recognition of its overall responsibility for the activities of the latter, which can be qualified as its de facto organs. The choice of the state not to directly involve its own bodies even to escape an immediate dispute about its responsibility necessarily implies the assumption of a certain risk for the activities carried out by private persons legally extraneous to its own organizational structure but on whose behaviour could actually have affected. In our opinion, the approach aimed at attributing to the controlling state the entirety of the unlawful actions

derived from the guiding principles on business and human rights proposed and developed by the UN in relation to the discussion on the duties that are imposed on the states in whose territories the relevant activities of multinational companies have occurred (Sandholtz, Whytock, 2017)[317]. The reflections on the duties of territorial states to "respect", "protect" and "guarantee a remedy"

produced by the group in question leads to the same substantive conclusions that lead to some cases commonly considered as examples of hypotheses of de facto organs. The circumstance according to which the major openings towards the recognition of more flexible criteria aimed at widening the possibilities of attribution to a state of acts of groups made up of private individuals, is essentially from courts competent to judge on the violations of humanitarian law and from bodies committed to safeguarding human rights. The importance of complicity as a specific imputation criterion of the international crime in the State implies that the object of consideration is the active or omissive behaviour of the organs of the state which contributes with proven effectiveness and with full psychology awareness to the execution of an at least materially illicit fact for international law (…) where international subjectivity is denied to the individual, it is equally possible to speak of complicity, even if only in a technical sense, in order to indicate the existence of an alternative criterion of attribution of state responsibility, with respect to which the private act represents a given purely factual, which allows it to emerge similarly to what happens in the event of non-compliance with due diligence obligations. Compared to this case, the attribution of complicity on the side of understanding would imply a more serious responsibility of the state than that deriving from the omission of suitable preventive and repressive measures: The act of the private would indicate precisely the material content of the offense committed by the state (…)".

[317]On the three fundamental obligations of states "to respect", "protect" and

developed with reference to the harmful activities of private individuals (multinational companies) operating in their territories. The same reasoning also apply in relation to the (illicit) activities of intergovernmental organizations. According to the first principle expressed in the guiding principles: "(…) states must protect against human rights abuse within their territory and/or jurisdiction by third parties", as if to impose the adoption of specific measures to prevent, investigate and put an end to the offenses carried out by organizations through "effective policies, legislation, regulations and adjudication" (Liakopoulos, 2020a; Rainey, Wicks, Ovey, 2021). In relation to "effective policies", measures of a diplomatic nature need to be adopted towards the organization that is responsible.

Failure to adopt diplomatic measures, reparation for the offense committed and state responsibility

The Ilaşcu case and the guiding principles show that a subject of international law, i.e. an organization, is legitimate to operate in the territory of the state where, depending on the activity or

"remedy", see the Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework, included in Resolution 17/4 of 16 June 2011 of the United Nations Human Rights Council, UN Doc. HR/PUB/11/04.

mission it carries out, it exercises its activity and maintains a margin of jurisdiction over individuals. The limitation of jurisdiction determines the reduction of the scope of the obligations payable according to human rights that are limited only to the positive ones.

This position also applies to states that also host projects financed by economic organizations which materialize human rights violations. The imposition of positive obligations on states that host the projects in their territory is considered as a fair compensation for national policy choices. States give part of their sovereignty and control over their territory to third parties as a choice that cannot completely backfire on individuals in the event that the subjects commit human rights violations. The host state of the organization's activities continues to burden the positive obligations of human rights protection according to the principle. Territorial states are required to behave with the utmost diligence to prevent the occurrence of violations of the Convention and which are committed by organizations if they fail to take appropriate steps to put an end to the violation, i.e. to adopt appropriate diplomatic measures against the organizations[318].

[318]"(…) clearly this does not exclude the relevance of the negative and positive obligations incumbent on sending states of the double organs operating in force actions, the violation of which implies a direct responsibility of these states for the offense committed. On the double

First of all, it was necessary to ascertain whether the territorial state maintained a minimum control in the territory through the exercise of limited jurisdiction. It is necessary to verify that the clauses excluding liability for failure to fulfill positive obligations are decisive for the circumstances related to the political and economic impossibility for the state hosting the organization's mission and the fulfillment of human rights treaties. This type of situation becomes important in conventional liability systems only when we are talking about clauses derogating or restricting the provisions envisaged. States party to human rights treaties may resort to derogation clauses in emergency situations and/or on necessary restrictions to the enshrined rights, as well as balancing with other needs in accordance with the requirements of proportionality and necessity. However, a certain level of diligence is required from states which could avoid arbitrary or manifestly unreasonable behaviour. A check on the adequacy of the measures, including those of a diplomatic nature, adopted by the states against the organization responsible for the offense allows for a check that is necessary and taking into account the fact that the actions or omissions undertaken on an international level by the states against the responsible organizations of the tort

---

organic nature of the contingents made available to the organizations and on the imputability of the unlawful conduct to the sending states (…)".

are the only ways available to bring the relevant remedy. In the same way, the adoption of internal measures of an administrative, legislative or judicial nature are also suitable to guarantee a remedy for violations committed on one's territory (Palchetti, 2014)[319].

States that host the activities of organizations on their territory according to the principle, duty to protect, puts into practice that individuals are subject to their jurisdiction and that they must obtain guarantees from the organization through the adoption of protocols or agreements that respect the rights of individuals who are present on their territory. Territorial states must provide internal procedures that collect and screen victims of violations. If it is considered inappropriate to defend individual interests on an international level (as opposed to national interests), states are called upon to offer a form of compensation to the victims, even in a symbolic way. This type of reasoning is oriented towards the practices of Art. 19 of the project on diplomatic protection (Denza, 2018) and supported in theory as a counterweight to the

[319]"(…) the organization's offense realizes a situation of denial of justice for the victims, if the conduct is exclusively attributable to the organization and there are no internal remedies available to the organizations, nor remedies before the national courts for via of immunities. Another issue is then to understand to what extent the diplomatic action of the state is an adequate "alternative" remedy for the victims (…)".

recognition of foreign states' immunities for serious human rights violations. On the other hand, the existence of internal procedures constitutes reparation for a prejudice that is suffered by the illicit behavior of the organizations, thus representing a partial satisfaction of the individual right of access to justice and for the states, as: “(...) a fulfillment of the obligation to “(to) remedy” which is imposed in cases of abuses committed on one's territory in light of the guiding principles (…). The hypothesis of state responsibility proposed by us must deal with reality and therefore it is necessary to ask ourselves whether would lead to significant results in terms of reparations for victims of violations (…)” (Liakopoulos, 2020a).

From the jurisprudence we have noted the power to prevent the violation of the rights protected by the ECHR, guaranteeing thus the related cessation. If this were not the case, the states under their jurisdiction often find the victims of crimes from weak or collapsing states which do not have the necessary resources to adopt preventive and subsequent measures against the responsible organization, including diplomatic ones. These considerations concern political and non-legal merit which are evaluated on a case-by-case basis by the relevant human rights control body which is responsible for responding to states for the violation of an obligation of conduct and not of result. Thus, only the state is

responsible, taking into consideration all the relevant circumstances that have to do with diligent conduct to prevent the offense which, once verified, requires reparation.

The identified diligence parameter takes into consideration the circumstances of the organization and the relative nature of the rule allegedly violated. The standard identified by the human rights control mechanisms is considered to be full diplomatic inertia of the state where in its own territory the result of a decision of an arbitrary or manifestly unreasonable nature must be considered in a manner compliant with the positive obligations provided for by the treaties. Thus it is claimed that state behavior such as bringing it to the attention of the organization requires reparation for the victims by establishing the appropriate diplomatic negotiations to obtain a result that coincides with economic compensation. The release from responsibility by states cannot be limited to an argument that has to do with effective and/or global control over the territory in which the alleged violations occurred and which demonstrate before the control bodies that they behave in a manner compliant with the standard of diligence legitimately required and possibly applied by derogation clauses or restrictions on conventionally established rights.

The responsibility of states is considered without limits and in terms of precise and achievable results where the fact that reparation by territorial states can be limited for victims. The arguments we have made so far are concrete and satisfy the de iure condendo perspective and involve an adequate incentive for the states that pressurize the relevant responsible party by inviting the organization to fulfill the relevant obligations according to the offense committed.

Concluding remarks

We must agree that until now the final objective in relation to the responsibility of international organizations was the imposition of customary norms, i.e. general principles seen in practice by states which ensure control of one's own actions in the face of a practice of organizations with a inhomogeneous and not sedimented way. The induction of an analysis that is limited to the general motto of what organizations do and say requires the virtuous practice of organizations as a result of uniformity between the organizations' behaviors which precludes a general and unitary vision necessary to address the topic under investigation. Responsibility as the main topic also of the related projects of the International Law Commission (ILC) offers us an axiomatic logic of the existence of

a practice compliant with the multiple and multifaceted forms of organizations for the de jure application of the norm that it imposes on every organization the duty to repair the damage caused by the tort. “A problem” within this framework is the individual who, according to the rules of general international law, is the recipient of reparation. The obligation of reparation towards individuals is intertwined with the primary one of guaranteeing a relative remedy such as access to justice in a broad sense and organizations that do not exercise a form of jurisdiction over individuals to affect the standard of compliance with the same rule. Individual law as part of the far-reaching norm imposes respect for the rule of law which is recognized as a fundamental principle of the international community and in a progressive, continuous and widespread way as a constraint also of organizations (Roach, 2021; Elòsegue, Miron, Motoc, 2021). This type of organizations recognize the applicability of the principles of rule of law and are bound to an entire package of customary norms for the protection of human rights which promotes the debate on the importance of issues for the Member States that have expressed the will to apply of the rule of law despite one's attitude which seems to go in the same direction (Roach, 2021).
The projects of the ILC of both 2001 and 2011 (Liakopoulos, 2020a) do not recognize rights to individuals in relation to the

responsibility of the discretionary initiative of the states with reduced scope of application in relation to cases of violation of human rights that are committed by organizations. Thus we can speak of a lack of protection for victims who encounter various difficulties when obtaining remedies directly from organizations for a painful reparation. The rules on organizational immunity are operational before national jurisdictions where the control mechanisms established by human rights treaties are not competent to receive complaints directed against and against organizations as well as established by organizations which are often inadequate for such work.

As regards individuals, there are several limits to one's perspective where the traditional discretion is exercised by states in these contexts. Within this legal framework, a political and non-negligible fact is added where the choice of states to intervene and protect individuals is altered by significant political and financial implications. The invocation of the responsibility of organizations can be discouraged by the fact that they depend on financing and support programs for states hypothetically called to act. It is likely that in these cases national interests end up compressing the rights of the injured individuals (Kosař, Petrov, Šipulovà, Smekal, Lyhnànek, Janovský, 2020). We are oriented towards a distortion of the one-to-one relationship on disputes arising in the field of

diplomatic protection due to the fact that several states are hiding behind the responsible organization. This disparity constitutes a further significant obstacle to invoking organizational responsibility. The practice of offenses committed within the framework of the UN emerges outside of procedural interventions as foreseen by the guidance and spirit of the sanctions committees, the presentation of complaints and the related negotiation of compensation favors the victims as rare phenomena that have occurred on the initiative also exclusively of the economically and politically strongest states.

The attribution of an illicit act to states allows the individual to access the jurisdictional systems of control established by human rights treaties and to invoke state responsibility according to the conventional regime. The establishment for the individual of the possibility of a dispute towards the responsible state is a remedy that leads to a precise and direct remedy compared to that possibly obtainable in disputes that are seen previously. The central point is the identification of the conduct attributable to states connected in various ways to the illicit behavior of the organisations. The ECHR proceeded to sort out the different hypotheses of responsibility that are attributed to the contracting states and to indicate new ones. A demarcation line marks the internal or international context where the conduct objectionable to the

contracting states takes place. The behaviors demonstrated are distinct and have been implemented by states within their own territorial borders as in the case of the adoption of internal measures for sanctions imposed by organizations or court decisions that recognize the immunities of organizations and/or one third country where the conduct of the military employed in actions of force authorized by the UN is noted.

Responsibility for the adoption of internal measures and obligations arising from the participation of states in organizations is a problematic aspect which has concerned the issues of attribution of conduct and existence having to do with state jurisdiction[320] despite the delicate coordination with the ECHR and the international obligations which demonstrate that the topic is thorny, obscure given the coordination of the resolutions of the Security Council with the rights established in a conventional way. The connection on international responsibility between the projects of the ILC and the ECHR is now obvious and connected in a de jure condendo perspective where the two regimes control, evaluate and examine the behaviors required by states at an international level.

According to the ECtHR, states are not freed from contractual

[320]"(…) the mere presence of acts with efficacy in the national territory of the contracting states was considered a sufficient element to justify the admissibility ratione personae loci of the appeals (…)".

human rights obligations as they have transferred some competences to international organizations. The transfer of competences takes place with the relative set of guarantees that are provided for by the conventional system where the judgment of the ECtHR has also been extended to the positive behaviors of the delegates of the states who are held within the bodies of the organization. Thus, a model was created aimed at ascertaining state responsibility for the relative conduct of their delegates who are involved in the adoption of decisions by the organizations. The model that breaks down the complex act of organizations in violation of human rights (in the case of resolutions) verifies the behavior in a single way and adopted by the representatives of a state in this context that respects the positive obligations from human rights treaties. Many issues that arise are thus highlighted and above all the problem relating to the standard of diligence that is required of the delegates of the states acting within the organizations and the existence of state jurisdiction in relation to conduct that occurs in the legal space of the organizations. The functional notion of state jurisdiction allows us to attribute a widespread responsibility to Member States of the organization and the act committed by the latter as well as a responsibility to Member States that maintain in a single way the complex decision-making processes, i.e. the substantial power that

indicates the rights of individuals.

The work of the procedures by the Sanctions Committees in relation to the delegates of states exercising autonomous and significant powers are elements of the practice of the conventional bodies which confirm the functioning of a relational model with the actions and omissions of the delegates in the framework of the procedures relating to the drafting and maintaining the lists of sanctioned individuals. The existence of positive obligations pushes us to ask for the adoption of behaviors of a diligent, preventive, subsequent nature by the state where its territory verifies the illicit acts of the organizations, demanding that the territorial state takes diligent action so that the organization makes reparations to the individuals who have harmed the establishment of appropriate contacts and diplomatic relations by adopting the necessary measures.

Disputes between individuals and states before the control bodies established by human rights treaties. The reparation of victims can generally be followed with the forms and methods that are foreseen by the conventional reference system based on the conduct complained of to states. This distinguishes between cases and conduct attributable to states which are similar to those theoretically attributable to organizations or in an autonomous manner and connected to the illicit behavior of the latter. The

reparation that is obtained by the individual is similar to that achievable in disputes between states and organizations as a response where an international body that is seized by individuals judges a state responsible for having implemented the sanctioning measures that are imposed by the Security Council and in violation of the conventional rights, sanctioned by obtaining the compensation which does not consist in the removal from the committee's lists but in a judicial review of the internal measure. As a result, the cancellation or modification of the same is achieved in an exclusive manner and at a national level. The compensation obtainable in the event that the control bodies ascertain the responsibility of the states due to the omitted supervisory activity within the organization and/or for the failure to intervene to protect the individuals harmed by its activities allows the implementation of a responsibility with organizations towards individuals.

In finis, responsibility or not, it is an affirmative reality where through the sanctioning, legal and political system of many bodies in this regard a unitary, effective, precise basis is missing. This prevents the establishment of a special type of liability regime. Mechanisms that are perhaps not perfectly suitable for guaranteeing the implementation of the organisation's responsibility according to the categories that are foreseen by the

projects of the ILC and which do not provide effective reparation for the damage suffered by individuals. The internal remedies that are operational for the UN seem to fall into the category of accountability systems which aim to guarantee compliance with the primary norms of international law such as respect for the rule of law, the principle of transparency, etc. Another high-level development of such systems oriented in the direction of external control of the operations of the organizations through mechanisms that are devoid of the sophisticated guarantees of the due process allow an independent examination of the appeals and possibly provide the relevant remedial measures for the injury suffered. The consolidation of this path prevents states from responding on the basis of titles of indirect responsibility and the internal shortcomings of the organizations to which they belong are members who deem necessary and due the relevant intervention to protect injured individuals. We remain ex novo in the same context of protected rights, first of all human dignity, human value and principles of the ECHR.

References

Aledo, L.A. (2021). *Le droit international public.* Dalloz, Paris.

Alland, D. (2021). *Manuel de droit international public*. PUF, Paris.

Amos, M. (2017). The value of the European Court of Human Rights to the United Kingdom. *The European Journal of International Law, 28 (3),* 767ss.

Amrullah, B. (1976). The international responsibility of the United Nations for activities carried out by UN peacekeeping forces. *Revue Égyptienne de Droit International, 32,* 69ss.

Bantekas, I., Oette, L. (2013). *International human rights law and practice.* Cambridge University Press, Cambridge.

Beaumont, P., Danon, M., Trimmings, K., Yüksel, B. (2017). *Cross-border litigation in Europe.* Hart Publishing, Oxford & Oregon, Portland.

Bell, C.A. (2010). Reassesing multiple attribution: The International Law Commission and the Behrami and Saramati decision. *International Law and Politics, 42*, 502-547.

Bernhardt, S. (2002). *The Charter of the United Nations, a commentary. Article 103.* vol. II. Oxford University Press, Oxford, 1293ss.

Bodeau-Livinec, P., Buzzini, G.P., Villalpando, S. (2008). ECHR

judgment on applicability of European Convention on Human Rights to acts undertaken pursuant to UN Chapter VII operation in Kosovo. *American Journal of International Law, 102,* 323-333.

Boisson De Chazournes, L., Pergantis, V. (2012). A propos de l'arrêt Behrami et Saramati: un jeu d'ombre et de lumière dans les relations entre l'ONU et les Organisations régionales. In M. Kohen and others (eds.). *Perspectives of international law in the 21st century. Perspectives du droit international au 21e siècle. Liber amicorum Professor Christian Dominicé in Honour of His 80th Birthday.* Martinus Nijhoff, Leiden, 180ss.

Boutin, B. (2019). Attribution of conduct in international military operations: A causal analysis of effective control. *Melbourne Journal of International Law, 18 (2)*, 157ss.

Boutin, B., Nedeski, N. (2020). The continuing saga of state responsibility for the conduct of peacekeeping forces: Recent practice of Dutch and Belgian Courts. *Netherlands Yearbook of International Law, 50 (1),* 15ss.

Brolmann, C. (2015). Member states and international legal responsibility. Developments of the institutional veil. *International Organizations Law Review, 12,* 358-381.

Büyükbay, C., Ertin, D. (2017). EU-Skeptizismus am Bosporus?. *Zeitschrift für Internationale Beziehungen, n. 2.*

Cannizzaro, E. (2014). Is there an individual right to reparation?

Some thoughts on the ICJ judgment in the jurisdictional immunities case. In D. Alland, V. Chetail, O. De Frouville, J.E. Viñuales. *Unity and diversity of international law. Essays in Honour of Professor Pierre-Marie Dupuy.* Oxford University Press, Oxford, 498.

Chukwuemeke Okeke, E. (2020). The tension between the jurisdictional immunity of international organizations and the right of access to court. In P. Quayle. *The role of international administrative law at international organizations.* ed. Brill, Bruxelles, 275ss.

Ciampi, A. (2011). Security Council targeted sanctions and human rights. In B. Fassbender. *Securing human rights?: Achievements and challenges of the UN.* Oxford University Press, Oxford, 123ss.

Condorelli, L. (2010). Le Conseil de sécurité, les sanctions ciblées et le respect des droits de l'homme. In L. Boisson De Chazournes, M. Kohene. *International law and the quest for its implementation. Liber amicorum Vera Gowlland-Debbas.* Martinus Nijhoff Publishers, Leiden, 73-84.

Costa, P. (2017). *La Cour europèenne des droits de l'homme. Des juges pour la libertè.* Dalloz, Paris.

Crawford, J. (2013). *State responsibility. The general part.* Cambridge University Press, Cambridge, 218ss.

Crawford, J., Keene, A. (2018). The structure of state responsibility under the European Convention on Human Rights. In A. Van Aaken, I. Motoc. *The European Convention on Human Rights and general international law*. Oxford University Press. Oxford.

Dalacoura, K. (2001). Islamist movements as non-state actors and their relevance to international relations. In D. Josellin, W. Wallace. *Non-state actors in world politics.* ed. Palgrave, London, New York, 236ss.

Dannenbaum, T. (2012). Killings at Srebrenica, effective control, and the power to prevent unlawful conduct. *International and Comparative Law Quarterly, 62 (3),* 713-728.

De Wet, E. (2013). From Kadi to Nada: Judicial techniques favoring human rights over United Nations Security Council sanctions. *Chinese Journal of International Law, 12,* 787-808.

Denza, E. (2018). Nationality and diplomatic protection. *Netherlands International Law Review, 65,* 467ss.

Direk, Ö.F. (2014). Responsibility in peace operations: Revisiting the proper test for attribution conduct and the meaning of the "effective control" standard. *Netherlands International Law Review, 61,* 1-22.

Dominice, C. (1999). Observations sur le contentieux des organisations internationales avec les personnes privées. *Annuaire*

Français de Droit International, 45, 623ss.
Doswald-Beck, L. (2011). *Human rights in times of conflict and terrorism*. Oxford University Press, Oxford, 159ss.
Dreysse, D. (2021). *Le comportement de la victime dans le droit de la responsabilitè internationale.* Dalloz, Paris.
Droesse, G. (2020). *Membership in international organizations. Paradigms of membership, structures, legal implications of membership and the concept of international organization.* ed. Springer, Cham, 2020.
Duffy, H. (2015). *The war on terror and the framework of international law.* Cambridge University Press, Cambridge.
Eckes, C. (2022). The autonomy of European Union law vis-à-vis international law: Kadi I and Kadi II. In G. Butler, R.A. Wessel. *European external relations law. The cases in context.* Hart Publishing, Oxford & Oregon.
Elòsegui, M., Miron, A., Motoc, I. (2021). *The rule of law in Europe. Recent challenges and judicial responses.* ed. Springer, Cham.
Fröhlich, M., Williams, A. (2018). *The UN Secretary General and the Security Council. A dynamic relationship.* Oxford University Press, Oxford, 2018.
Garcin, M. (2015). The haitian cholera victims complaints against the United Nations. *Zeitschrift für ausländisches öffentliches*

Recht und Völkerrecht, 75, 680ss.
Gasseling, K. (2017). The legacy of Srebenica. Potential consequences of reducing liability for troop contributing countries in modern UN peacekeeping operations. *Boston College of International and Comparative Law Review, 40 (2),* 348ss.
Gasso, A., Sauron, J.L. (2021). *Droit processuel europèen.* Legitech, Luxemburg.
Geiger, C., Izyumenko, E. (2020). Shaping intellectual property rights Through human rights adjudication: The example of the European Court of Human Rights. *Mitchell Hamline Law Review, 46 (3),* 538ss.
Grard, L. (2013). La communautarisation de "Bruxelles I". *Revue Gènèrale de Droit International Public, 117 (4),* 530ss.
Green, J.A., Waters, C.P.M. (2014). *Adjudicating international human rights. Essays in honour of Sandy Ghandi.* Martinus Nijhoff Publishers, The Hague.
Grenfell, K. (2016). Partnerships in UN Peacekeeping. *International Organizations Law Review, 13,* 55-73.
Grover, L. (2012). *UN human rights treaty bodies law and legitimacy.* Cambridge University Press, Cambridge.
Guggisberg, S. (2012). The Nada case before the ECTHR: A new milestone in the European debate on Security Council targeted sanctions and human rights obligations. *Croatian Yearbook of*

European Law and Policy, 8, 416ss.
Harris, D., O'Boyle, M., Warbrick, C. (2014). *Law of the European Convention on Human rights*. Oxford University Press, Oxford, 372ss.
Hessbruegge, J.A. (2013). The European Court of Human Rights: Catan and others v. Moldova and Russia. *International Legal Materials, 52 (1),* 219ss.
Higgins, R., Webb, P., Akande, D., Sivakumaran, S., Sloan, J. (2018). *Oppenheim's international law: United Nations.* Oxford University Press, Oxford.
Hoffmeister, L. (2006). Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland. App. No. 45036/98. *American Journal of International Law, 100,* 447ss.
Hollenberg, S. (2015). The diverging approaches of the European Court of Human Rights in the cases of Nada and Al-Dulimi. *International and Comparative Law Quarterly, 64,* 454ss.
Hong, M. (2016). Human dignity, identity review of the European Arrest Warrant and the Court of justice as a listener in the dialogue of Courts: Solange-II and Aranyosi: Bverfg 13 December 2015, 2 BvR 2735/154 Solange III and ECJ (Grand Chamber) 5 April 2006, joined cases C-404715 and C-659/15 PPU, Aranyosi and Căldăraru. *European Constitutional Law Review, 12,* 550ss.
Istrefi, K., Ryngaert, C. (2021). Makuchyan and Minasyan v.

Azerbaijan and Hungary: Novel questions of state responsibility, presidential pardon, and due diligence of sentencing transfer meet in a rare case of the right to life. *European Convention on Human Rights Law Review, 2,* 267ss.

Jakubowski, A., Wieczyńska, K. (2016). *Fragmentation vs the constitutionalisation of international law: A practical inquiry.* Routledge, London & New York, 2016.

Jayakody, N. (2018). Refining United Nations Security Council targeted sanctions. *Security and Human Rights*, *29* (1-4), 92ss.

Jelinić, Z., Knol Radoja, K. (2018). Mutual recognition of judicial decisions and the right to a fair trial with special focus on the ECHR's findings in the case of Avotiņš v. Latvia. *EU and Comparative Law Issues and Challenges Series (ECLIC), 2,* 575ss.

Juss, S., Sunkin, M. (2017). *Landmark cases in public law.* Hart Publishing, Oxford & Oregon, Portland, 258ss.

Kadelbach, S. (2016). Al-Dulimi and Montana management Inc v. Switzerlnd (ECtHR). *International Legal Materials, 55 (6),* 1023ss.

Klabbers, J. (2015). *An introduction to international organizations law*. Cambridge University Press, Cambridge.

Klabbers, J. (2017). Reflections on role responsibility: The responsibility of international organizations for failing to act.

European Journal of International Law, 28 (4), 1157ss.
Klein, P. (2007). Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt Behrami et Saramati. *Annuaire Français de Droit International, 53,* 43ss.
Kolb, A.S. (2017). *The UN Security Council members' responsibility protect. A legal analysis.* ed. Springer, Berlin.
Kolb, R. (2004). Does Article 103 of the Charter of the United Nations apply only to decisions or also to authorizations adopted by the Security Council?. *Zeitschrift fur äuslandisches und öffentliches Recht und Völkerrecht, 64,* 21ss.
Kolb, R. (2017). *The international law of state responsibility. An introduction.* Edward Elgar Publishers, Cheltenham, 70-71.
Kosař, D., Petrov, J., Šipulovà, K., Smekal, H., Lyhnànek, L., Janovský, J. (2020). *Domestic judicial treatment of European Court of Human Rights case law. Beyond compliance.* ed. Routledge, London & New York.
Krenc, F. (2009). La Belgique "condamnée" pour la première fois par le Comité des droits de l'homme sur fond de lutte contre le terrorisme: cap sur Genève!. *Journal des Tribunaux, n. 6367 (24 oct. 2009),* 621ss.
Lacchi, C. (2015). The ECtHR's interference in the dialogue

between National Courts and the Court of Justice of the EU: Implications for the preliminary reference procedure. *Review of European Administrative Law, 9 (1),* 96ss.
Langford, M., Vandenhole, W., Scheinin, W., Van Genugten, W. (2017). *Global justice, state duties. The extraterritorial scope of economic, social and cultural rights in international law.* Cambridge University Press, Cambridge, 188ss.
Larik, J. (2014). The Kadi saga as a tale of strict observance of international law: Obligations under the UN Charter, targeted sanctions and judicial review in the European Union. *Netherlands International Law Review, 61 (1),* 34ss.
Larsen, K.M. (2008). Attribution of conduct in peace operations: the "ultimate authority and control" test. *European Journal of International Law, 19 (3),* 509, 520ss.
Lawson, R.A. (2004). *Life after Bankovic: On the extraterritorial application of the European Convention of Human Rights, in Extraterritorial application of the Human Rights Treaties.* ed. Intersentia, Antwerp, 83-123.
Lazăr E. (2015). The impact of Security Council's resolutions in the jurisprudence of the ECHR. *The New Review of Human Rights, 11 (2),* 34ss.
Leach, P. (2011). *Taking a case to the European Court of Human Rights.* Oxford University Press, Oxford.

Liakopoulos, D. (2020a). *Complicity of states in the international illicit*. ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020b). *The role of not party in the trial before the International Court of Justice*. ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020c). *Complicity in international law.* W.B. Sheridan Law Books, ed. Academica Press, Washington, London.
Liakopoulos, D. (2020d). *International organizations and reparations.* W.B. Sheridan Law Books, ed. Academica Press, Washington, London.
Linderfalk, U. (2020). *Understanding jus cogens in international law and international legal discourse.* Edward Elgar Publishers, Cheltenham.
Lorenz, N.L.A., Groussot, X., Petursson, G.T. (2013). *The European human rights culture. A paradox of human rights protection in Europe?.* Martinus Nijhoff Publishers, Leiden.
Maddock Dillon, E., Dexter, M. (2016). *The Haitian revolution in the early United States: Histories, textualities, geography.* University of Pennsylvania Press, Pennsylvania.
Mallory, C. (2012). European Court of Human Rights. Al Skeini and others v. United Kingdom judgment of 7 July 2011. *The International and Comparative Law Quarterly, 61 (1),* 304ss.
Marguery, T. (2017). Je t'aime moi non plus the Avotiņš v. Latvia judgement. An answer to the CJEU. *Review of European*

Administrative Law, 10 (1), 116ss.
Marhic, G. (2013). Le régime de responsabilité des opérations de paix de l'Union européenne: quelles règles applicables?. *Revue Belge de Droit International, 117 (1),* 44 and 137ss.
Mclachlan, C. (2014). *Foreign relations law*. Cambridge University Press, Cambridge, 334ss.
Miko S.A. (2013). Norm conflict, fragmentation, and the European Court of Human Rights. *Boston College Law Review, 54 (3),* 1370ss.
Milanovic, M. (2009). The Human Rights Committee's views in Sayadi v. Belgium: A missed opportunity. *Goettingen Journal of International Law, 3,* 520ss.
Milanovic, M. (2011). *Extraterritorial application of human rights treaties: Law, principles, and policy.* Oxford University Press, Oxford.
Milanovic, M. (2012). Al-Skeini and Al-Jedda in Strasbourg. *European Journal of International Law, 23,* 123ss.
Milanovic, M., Papic, T. (2009). As bad as it gets: The European Court of Human Rights' Behrami and Saramati decision and general international law. *International and Comparative Law Quarterly, 58,* 267-296.
Milanović, M., Papić, T. (2021). Makuchyan and Minasyan v. Azerbaijan and Hungary. *American Journal of International Law,*

115, 294, 297ss.
Miltner, B. (2012). Revisiting extraterritoriality after Al-Skeini: The ECHR and its lessons. *Michigan Journal of International Law, 33,* 698ss.
Moelle, M.P. (2013). *The international responsibility of international organizations. Cooperation in peacekeeping operations.* Cambridge University Press, Cambridge.
Momirov, A. (2012). Dutch courts and Srebrenica: Ascribing responsibilities and defending legally relevant relationships. *Netherlands Yearbook of International Law, 43*, 233ss.
Morgan, J. (2013). Negligence: into battle. *The Cambridge Law Journal, 72 (1),* 155ss.
Morris, T. (2022). State responsibility and accountability in UN peacekeeping: The case of The Mothers of Srebrenica v. The Netherlands. *International Peacekeeping, 29 (2),* 209ss.
Nedeski, N. (2022). *Shared obligation in international law.* Cambridge University Press, Cambridge.
Nedeski, N., Nollkaemper, A. (2012). Responsibility of international organizations “in connection with the acts of states”. *International Law Review Shares Research Paper n. 8-Shares research project on shared responsibility in international law (2012), Amsterdam Centre for International Law 2012-05.*
Negrelius, J., Kristoffersson, E. (2015). *Human rights in*

contemporary European law. Hart Publishing, Oxford & Oregon, Portland, 17ss. Nollkaemper, A., Jacobs, D. (2013). Shared responsibility in international law: A conceptual framework. *Michigan Journal of International Law, 34,* 359, 408ss.
Okada, Y. (2019). Effective control test at the interface between the law of international responsibility and the law of international organizations: Managing concerns over the attribution of UN peacekeepers' conduct to troop-contributing nations. *Leiden Journal of International Law, 32(2),* 278ss.
Orakhelashvili, A. (2008). R (on the Application of Al-Jedda) (FC) v. secretary of state for defence. [2007] UKHL 58. *The American Journal of International Law, 102 (2),* 340ss.
Palchetti, P. (2014). Can state action on behalf of victims be an alternative to individual access to justice in case of grave breaches of human rights?. *Italian Yearbook of International Law, 24,* 53ss.
Papa, M.I. (2016). The mothers of Srebrenica case before the European Court of Human Rights: United Nations immunity versus right of access to a court. *Journal of International Criminal Justice*, 14 (4), 898ss.
Pasquet, L. (2021). Litigating the immunities of international organizations in Europe: The "alternative remedy" Approach and its "humanizing" function. *Utrecht Journal of International and European Law, 36 (2),* 198ss.

Petculescu, I. (2005). Droit international de la responsabilitè et droits de l'homme. *Revue Gènèrale de Droit International Public, 109,* 590ss.

Petiteville, F. (2021). *Les Organisations Internationales.* La Dècouverte, Paris.

Poelle, M.P. (2017). *The international responsibility of international organizations in peacekeeping operations.* Cambridge University Press, Cambridge, 168ss.

Rainey, B., Wicks, W., Ovey, C. (2021). *Jacbos, White and Ovey: The European Convention on Human Rights.* Oxford University Press, Oxford.

Reinisch, A. (2000). *International Organisations before national courts.* Cambridge University Press, Cambridge.

Roach, K. (2021). *Remedies for human rights violations. A two-track approach to supra-national and national law.* Cambridge University Press, Cambridge, 538ss.

Rosas, A. (2014). Balancing fundamental rights in EU law. *Cambridge Yearbook of European Legal Studies, 16,* 348ss.

Ryngaert, C. (2011). The European Court of Human Rights approach to the responsibility of Member States in connection with acts of International Organizations. *International and Comparative Law Quarterly, 60 (4),* 1000ss.

Ryngaert, C. (2015). The responsibility of Member States of

International Organizations. Concluding observations. *International Organization Law Review, 12,* 516ss.
Ryngaert, C., Istrefi, K., 2021. Introduction: Special issue: The legacy of the mothers of Srebrenica Case. *Utrecht Journal of International and European Law, 36 (2),* 115ss.
Ryngaert, C., Spijkers, O. (2019). The end of the road: State liability for acts of UN peacekeeping contingents after the Dutch Supreme Court's judgment in Mothers of Srebrenica. *Netherlands International Law Review, 66,* 540ss.
Sakara, N. (2021). The applicability of the right to a fair trial in civil proceedings. The experience in Ukraine. *Access to Justice in Eastern Europe, 1 (9),* 200ss.
Sandholtz, W.A., Whytock, C.A. (2017). *Research handbook on the politics of international law.* Edward Elgar Publishers, Cheltenham, 380ss.
Sari, A. (2008). Jurisdiction and international peace support operations. The Behrami and Saramati cases. *Human Rights Law Review, 8 (1),* 154ss.
Sari, A. (2012). UN peacekeeping operations and article 7 ARIO: The missing link. *International Organizations Law Review, 9 (1),* 77-85.
Schabas, W.A. (2015). *The European Convention on Human Rights: A commentary*. Oxford University Press, Oxford, 1755ss.

Scharf, M.P. (2019). How the Tadić appeals chamber decision fundamentally altered customary international law. In M. Sterio, M. Scharf. *The legacy of ad hoc tribunals in international criminal law. Assessing the ICTY's and the ICTR's most significant legal accomplishments.* Cambridge University Press, Cambridge.

Schönsteiner, J. (2019). Attribution of state responsibility for actions or omissions of state-owned enterprises in human rights matters. *University of Pennsylvania Journal of International Law, 40,* 898ss.

Seibert-Fohr, A., Villiger, M.E. (2017) *Judgments of the European Convention of Human Rights. Effects and implementation.* ed. Nomos, Baden-Baden.

Spielmann, D. (2013). *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme,* (Réunion conjointe de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme-Réseau des présidents des Cours suprêmes judiciaires de l'Union européenne, Helsinki 6 septembre 2013).

Sudre, F. (2021). *La Convention europèennes des droits de l'homme.* PUF, Paris.

Szydło, M. (2012). Extra-territorial application of the European Convention on Human Rights after Al-Skeini and Al-Jedda. *International Criminal Law Review*, *12*(2), 274ss.

Tanaka, Y. (2018). *The peaceful settlement of international disputes*. Cambridge University Press, Cambridge.
Taylor, R. (2022). Court of Justice of the European Union, European Court of Human Rights, respect for human rights and restrictive sanctions. *Yearbook of European Union and Comparative Law, 1 (1),* 180ss.
Timmermans, F. (2013). Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights. In M. Van Roosmaley, B. Vermeulen, F. Van Hoof, M. Oosting. *Fundamental rights and principles. Liber amicorum Pieter Van Dijk*. Intersentia, Antwerp, Oxford, 225ss.
Tomuschat, C. (2014). *Human rights: Between idealism and realism.* Oxford University Press, Oxford.
Tzanakopoulos, A. (2011). *Disobeying the Security Council.* Oxford University Press, Oxford.
Uerpmann-Wittzack, R. (2012). Rechtsfragen und Rechtsfolgendes Beitritts der Europäischen Union zur EMRK. *Europarecht, 47 (2),* 168ss.
Van Der Have, N. (2017). *The prevention of gross human rights violations under international human rights law*. ed. Springer, Berlin.

Villiger, M.E. (2023). *Handbook on the European Convention on Human Rights*. ed. Brill, Bruxelles.

White, N.D. (2011). *The law of international organizations.* Oxford University Press, Oxford.

Wilde, R. (2005). The legal space or espace juridique of the European Convention on Human Rights: Is it relevant to extraterritorial state action?. *European Human Rights Law Review, 2,* 116ss.

Zeegers, K. (2016). *International criminal tribunals and human rights law. Adherence and contextualization.* ed. Springer, Berlin,17ss.

Ziccardi Capaldo, G. (2013). *The pillars of global law.* Ashgate Publishing, London, 295ss.

Zimmermann, A., Tomuschat, S., Oellers-Frahm, K., Tams, C.J., Kashgar, M., Diehl, D. (2019). *The statute of the International Court of Justice. A commentary.* Oxford University Press, Oxford, 1418ss.

Codification of armed conflicts and international responsibility. A work of the International Law Commission completed or under review?

DOI:10.5281/zenodo.10572582

Cynthia Miller, Independent researcher. PhD in international law- University of Missouri. Attorney at Law.

Introduction

When we talk about international responsibility we immediately refer to the related codification of the International Law Commission (ILC) which proceeds with the development of international law in the specific sector and regulate responsibility on treaties during armed conflicts (Mcrae, 2012; Liakopoulos, 2020a). A codification on armed conflicts which began in 2004 with the rapporteur Ian Brownlie putting the matter under

discussion for the first time. Follow the relevant four reports on the subject[321] as well as the memorandum of the Secretariat[322] that is connected with the responsibility in armed conflicts. Over time, the work of another rapporteur, Lucius Caflish[323], was added. It was important and protagonist for the production of articles in 2011[324] that also submitted to the United Nations General Assembly. The ILC has taken note of this work and also considered the possibility of developing a related convention on the subject. The General Assembly reached the drafting of a related convention and the draft articles with the Resolution no.

[321]In particular see: https://legal.un.org/Ilc/guide/1_10.shtml. ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), 2005, A/CN.4/552; 2). ILC, Fifty-eighth session, Second report on the effects of armed conflict on treaties (by I. Brownlie), 2006, A/CN.4/570; 3). ILC, Fifty-ninth session, Third report on the effects of armed conflict on treaties (by I. Brownlie), 2007, A/CN.4/578; 4). ILC, Fifty-ninth session, Fourth report on the effects of armed conflict on treaties (by I. Brownlie), 2007, A/CN.4/589.

[322]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, A/CN.4/550.

[323]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), 2010, A/CN.4/627.

[324]ILC, Sixty-third session, Draft article on the effects of armed conflicts on treaties, 2011:
https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf

66/99 of 2011 and the Resolution A/C.6/69/L.9 of 2014.

Where are draft articles applied in the field of armed conflict?

The project of the ILC of 2011 is divided into three parts. The first (articles 1-12) contains the objectives and relevant definitions. The second (articles 3-13) provides the fundamental rules and addresses the issues that are connected with the legal effects of armed conflicts on treaties, including that of severability. This part also includes general topics of public international law. The third part (articles 14-18) addresses various issues as well as the name of the part itself: "Miscellaneous" also including the use of safeguards.

The objective of the codification is the regulation of the subject and the effects of armed conflicts on the treaties which until now was not a single voice which concentrated all the topics of analysis in this regard. This project regulates the effects that are caused in armed conflicts on relations between states party to a treaty and beyond. This is how art. 1 begins: "(…) draft articles apply to the effects of armed conflict on the relations between states under a treaty (…)" (Distefano, 2019).

The major problem during the discussions was that when the state involved which is part of an armed conflict turns out to be covered by Articles 61 and 62 of the Vienna Convention in the Law of Treaties (VCLT) of 1969 (Hollis, 2020) also including the

supervening impossibility of execution of the treaty as well as the circumstances in which the treaty was stipulated (Channg-Tung, Garcia, 2019)[325]. Already, the rapporteur Caflisch was of the opinion of accepting a less restrictive position from the beginning[326]. He also stated that: "(…) relations between states under a treaty (…) extend the field of application of the project also to states which are not parties to an armed conflict but parties to a treaty, of which a state engaged in an armed conflict (…)". The project only covers relations between states and not those between states and other subjects of international law, such as international organizations. The scope of this project could cover three different cases. The possibility concerning conventional relations between two states both involved in an armed conflict, regardless of whether they fight on the same side or not; the

[325]See: ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), 2010, A/CN.4/627 and Add. 1, p. 2, par. 6. theory which is accepted by Portugal (A/CN.4/622 and A/C.6/63/SR.19, par. 26) and by Poland (A/CN.4/622.

[326]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by Caflisch), 2010, op. cit., p. 3, par. 7, affirmed that: "(…) such restriction would reduce the scope and usefulness of the draft articles too much. It would also mean that there were armed conflicts and armed conflicts: the effects of some would be determined by the draft articles, while the effects of others would not. This does not seem to be a desirable approach (...)".

second possible situation could instead be that concerning the relationship between a state engaged in an armed conflict and another third state not part of that conflict; finally, the relationships between a state at war and a third state could come into relief as a consequence of the outbreak of a non-international armed conflict (Roithmaier, 2023)[327].

As can also be understood from the statements of the rapporteur as well as from the draft articles themselves, bilateral and multilateral treaties use the expression treaties according to the same art. 1 which considers and refers to the generality of the treaties and not a specific protection objective such as that of an armed conflict.

Furthermore, the project has also been applied to the treaties that international organizations are party to. For some states their application was contrary to an inclination that the rapporteur himself did not share[328]. And all this by referring to Art. 73 CVLT of 1969 and of Art. 74, par. 1 of the Vienna Convention of 1986 on the law of treaties between states and international organizations or between international organizations that the relevant provisions of the convention are pre-established and the questions that arise and which concern the treaty between one or

[327]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1, p. 1, par. 2.

[328]See: China (A/CN.4/622).

more states and/or with an international organization after it has started an armed conflict with states[329].

What problems exist between responsibility and armed conflict? Is there a connection between them?

The continuous conflicts in our days are many, violent and continuously increasing as a consequence of an economic, social and political crisis. The notion of war is evolving within the scope of the UN.

Within this context, the ILC stated in this regard and against the opinions of the United States that: "(...) a definition of armed conflict[330] (...) accommodates the broadest and most neutral notion possible: art. 2 lett. b) of the draft articles on the effects of armed conflicts on treaties provides that armed conflict means a situation in which there has been a resort to armed force between states or protracted resort to armed force between governmental authorities

[329]According to art. 74 par. 1 of VCLT: "(…) the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty between one or more states and one or more international organizations from a succession of states or from the international responsibility of a state or from the outbreak of hostilities between states (...)".

[330]See: A/CN.4/622.

and organized armed groups (...)"[331].

This is not an original definition given that the ILC took inspiration from the Appeal Chamber of International Criminal Court for former Yugoslavia in Tadić case (Nortmann, Reinisch, Ryngaert, 2015; Liakopoulos, 2020a). This is not an immediate and certainly not peaceful notion given that the ILC reached a definitive choice that took into consideration two different notions of armed conflict. A first that considers and provides through Art. 1 the resolution of the Institute of International Law of 1985. A position that was also used by the same rapporteur Brownlie, reporting these thoughts also in the first three reports[332]. It was not, however, suitable according to the objective in question since it dates back to a disturbing period in the international scene where the concept of armed conflict refers only to international armed conflicts (Dupuy, Kerbrat, 2020).

[331]ILC, Sixty-third session, Draft article on the effects of armed conflicts on treaties, op. cit., art. 2, lett. b).

[332]ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties, 2005, A/CN.4/552, art. 2 lett. b), par. 16, which is affirmed that: "(…) armed conflict means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between states parties to the armed conflict and third states, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict (...)".

We add art. 2 which is common to the four Geneva conventions relating to international armed conflicts as well as Art. 1, par. 1 of the II additional protocol concerning non-international armed conflicts. Two articles that position and reach a unique definition of the term by stating that: "(...) such solution would offer the advantage of using the same definition of armed conflict in the field of international humanitarian law and the law of treaties. The disadvantage, however, was that it would be burdensome and also to a certain extent circular (...)"[333]. A position which in reality has hindered the univocal construction of the notion of armed conflict where the ILC sought an immediate and simple solution.

Therefore, given the difficulties, the ILC followed some different points in its statements. First of all, it stated that: "(…) armed conflict means a situation in which there has been a resort to armed force between states (…)"[334] thus clarifying that armed force between two states is qualified as an armed conflict and that it falls within the subject of the relevant articles in this regard. In particular the letter. b) considered armed conflicts only of an international nature and between sovereign states. Subsequently, the use of the expressions: "(...) resort to armed force between

[333]ILC, Sixty-second session, Report on the work, 2010, par. 207, A/65/10.

[334]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1, p. 1, par. 2.

governmental authorities and organized armed groups (...)"[335]states that non-international armed conflicts such as for example wars of national liberation allow the possibility of verification in two different types of armed conflicts that produce treaty consequences.

Thus the applicability of the articles also extends to the armed conflicts that represent the work of the ILC. For some states, the opposition to this type of expansion was a logical reality which was also noted in the draft articles[336]. Such as China, which stated that the legal basis for this position was rejected by the Special Rapporteurs in time based on Art. 73 of the 1969 Vienna Convention on the Law of Treaties between states[337].

We need a comparable balance between armed conflicts and international ones by decisively considering the former which in reality are the most frequent in practice from those of other types of conflicts which present themselves as external elements to these. The provenance of weapons which they use and the related funding are endless topics that come outside the work of the ILC

[335]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1, p. 1, par. 2.

[336]The dissenting states are: China (A/C.6/60/SR.18, par. 8), Indonesia (A/C.6/63SR.18, par. 49), Iran (A/C.6/63/SR.18, par. 54), Poland (A/C.6/63/SR.17, par. 49) and others.

[337]See: A/C.6/63/SR.17, par. 53.

but which are certainly taken into consideration.
Non-international armed conflicts thus undermine the operation of treaties and conflicts of an international nature (Heffes, Frenkel, 2017)[338]. On the other hand, internal conflict falls within the application of the articles of the draft as protracted and which have the objective of limiting acts of violence. Already the rapporteur Caflish based himself on the text and on Art. 2, letter. b) of the draft affirming that: "(...) international and non-international armed conflict (...) reducing interpretative problems to a minimum and eliminating the possibility of contrary interpretations (...) should be considered applicable in the presence of any armed conflict (…)". Statements taken from the Tadić ruling showing the modernity, innovation and specificity of the topic and the commitment shown for codification to have results in tempis.
For example, the United Kingdom and the United States have stated that are applicable: "(…) without prejudice to international humanitarian law (...)"[339]. And for the rapporteur Caflisch: "(...) humanitarian law represents the lex specialis that governs armed conflicts. He considered it possible to make this clarification in Art. 2 (…)". Continuing with declarations from Cuba that

[338]ILC, Draft articles on the effects of armed conflicts on treaties with commentaries, 2011, par. 8, pag. 4.
[339]See, A/C.6/63/SR.18, par. 21.

according to their past they wanted to include the embargo in armed conflicts. The speakers were certainly in favor given that the embargo is a measure of a coercive nature and is used in conditions where an armed conflict produces legal effects on conventional law that already exists[340].

Another problem concerning the notion of armed conflict was that of territorial occupation. An always present problem given that in practice it includes the notion of armed conflict as preferable to a specific way for the draft articles. Art. 18 of the 1954 Hague Convention on the Protection of Cultural Property was also noted, taking into consideration armed conflict and partial or total occupation of the territory of a party to a treaty[341].

The "problem" not only in theory but also in practice was the distinction obtained by the United States between the terms of

[340]See, A/CN.4/622.

[341]Article 18: Application of the Convention: "(...) 1. Regardless of the provisions that must come into force from the time of peace, the present Convention shall apply in the event of a declared war or any other armed conflict arising between two or more High Contracting Parties, even if the state of war is not recognized by one or more of them; 2. The Convention will apply equally, in all cases of total or partial occupation of the territory of a High Contracting Party, even if such occupation does not meet any armed resistance (…)".

armed conflict and occupation[342]. Therefore, the rapporteur Caflisch stated in this regard that: "(...) occupation represents an event that can occur during the course of an armed conflict (…). Trying to establish an equivalence between the two terms is not exactly correct even occupying power (in fact) takes on certain duties which do not arise in situations of armed conflict that do not involve occupation, such as the duty to restore public order while respecting the laws in force in the occupied territory (…)" (Baarde, Mührel, Petrov, 2018). The same must be considered applicable even in the case of an occupation and in absence of hostility between the parties[343].

No necessary termination or suspension as a general rule

The speakers are not only based on theory and states' positions but also in practice. Art. 3 affirms:"(…) outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties: a) as between states parties to the conflict; b) as between a state party to the conflict and a state that is not (…)". As far as employment is concerned, it puts in a negative light the occupied state that fulfills the relevant obligations that come from

[342]See, A/CN.4/622 and A/C.6/63/SR.18, par. 21.

[343]ILC, Draft articles on the effects of armed conflicts on treaties with commentaries, op. cit., par. 29.

conventional law[344].

We immediately notice the unambiguity and originality of the relevant article, stating that the theories and criticisms suffered in this regard despite having avoided taking declarative positions and have in any case underlined the absence of a specific rule in this regard. The absence of a precise rule given the dissenting and differing opinions from various states showed that the rule includes a negative character and therefore that the preferred wording from the ILC was to follow a positive notion which states that the principle and the treaties continue throughout existence of an armed conflict in time[345]. The cause of the absence of an ad hoc rule also allowed the ILC to write that war does not necessarily extinguish every single treaty (McNair, 1961)[346]. This is a position

[344]ILC, Fifty-eighth session, Second report on the effects of armed conflict on treaties, 2006, A/CN.4/570, par. 11.

[345]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 34: "(…) was promptly rejected by the speakers as -in the current state of international law regarding the effects of armed conflicts on the treaties-it does not seem possible to go so far. We have seen, in fact, that in a sensitive subject such as this, neither doctrine nor jurisprudence have been able to establish solid and shared bases (...) a negative formulation of the law seems, at least for the moment, to be the solution that reflects the common sentiment of the international community (…)".

that has taken a fundamental role[347]. The ILC (…) established by Art. 2 of the resolution adopted by the Institute of International Law in 1985, which the outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties in force between the parties to the armed conflict (...)"[348]. We continue with the words of Briggs, who stated that:"(…) our first-and most important-rule is that the mere outbreak of armed conflict (whether declared war or not) does not ipso facto terminate or suspend treaties in force between parties to the conflict. This is established international law (…)" (Briggs, 1953)[349].

In reality we can say that Art. 3 of the draft had a rigorous, specific, restricted character and had to be distinguished from the use of Art. 2 of the resolution of the Institute of International Law which in reality referred only to the treaties in force of an armed conflict. The articles of the ILC lead to an extension of the

[346]"(…) jurisprudence, instead, see for example the aforementioned Karnuth v. United States of 1929, which is affirmed that: "(…) there seems to be fairly common agreement that, at least, the following treaty obligations remain in force (…)".

[347]ILC, Draft Articles on the effects of armed conflicts on treaties with commentaries, op. cit., p. 5.

[348]ILC, Draft Articles on the effects of armed conflicts on treaties with commentaries, op. cit., p. 5.

[349]ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), op. cit., par. 27 and 28.

application which is referred to the treaties and the parties are involved in an armed conflict as well as to a state that is party to a conflict with a third state[350].

Thus Art. 3 receives a more extensive interpretation, broad in relation to the operation of treaties between state parties that are parties to an armed conflict and those where the state is a party to the treaty and the armed conflict and a third state according to the letter. b) of the article which is intended for states that are not parties to an armed conflict and/or to a treaty or in both positions found[351].

Therefore, even from the title of the article it was preferred to speak in general principle and the following was not inserted: "(...) absence of ipso facto termination or suspension (...)" which had the aim of replacing the expression presumption of continuity[352], where the rapporteur recognized that "(...) the title definitively adopted may not be entirely clear". He preferred not to resort to the presumption of continuity formula. The fate of a treaty depends on a series of factors indicated in articles 4 and

[350]ILC, Fifty-eighth session, Second report on the effects of armed conflict on treaties (by I. Brownlie), op. cit., par. 14. See also: A/C.6/60/SR.18 par. 27.

[351]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 37.

[352]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 38.

following of the draft[353].

The ipso facto term was actually used to replace ambiguous and not very precise and clear expressions of terms automatically or necessarily. So, the use of ipso facto decisively reflects the intentions that the institution of international law and the ILC followed in this regard[354]. They also did not take into account Latin terms as often happens in conventional international law[355].

Evaluation of the conventional law that pre-exists the armed conflict

As regards the criteria that establish the fate of a treaty, we refer to Art. 4 of the 2011 draft which addressed the topic of armed conflicts over treaties in a non-univocal way, representing some stages that it considered in arriving at the identification of the results of armed conflicts over treaties. Art. 4 failed to arrive at a solution as we see later through articles 5 and 6. Art. 4 entitled: "Provisions of the operation of treaties", affirms that: "(…) a treaty itself contains provisions on its operation in situation of

[353]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 38.

[354]See the positions of: Greece (A/C.6/63/SR.18 par. 42), Switzeland (A/CN.4/622) and others.

[355]ILC, Sixty-second session, Report on the work, 2010, op. cit., par. 217.

armed conflict, those provisions shall apply (...)"[356].

Article 4 took into consideration the possibility that is envisaged by the treaties of continuing to remain in force even when the conclusion of an armed conflict comes as a reality of practice and subsequently of theory (McNair, 1961)[357] and where the same contracting parties form a permanent basis of individual agreements. In this regard, Lord McNair stated that: "(...) there was sufficient evidence to believe that the treaties which aimed to regulate the relations between the contracting parties during an armed conflict remained in force during the war, without any act being necessary of reactivation at the end of hostilities (…)" (McNair, 1961; Whiteman, 1970; American Law Institute, 1987)[358]. The effects of armed conflicts on treaties verify that the

[356]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., par. 26: "(…) treaty provisions expressly confirming the applicability of the treaty during armed conflict or war will generally be honoured (...)".

[357]"(…) the 1815 Convention between the United Kingdom and Russia expressly provided that the obligation to repay a loan should survive the outbreak of a war. For this reason, in fact, the British government-precisely by virtue of this express clause-continues to perform the service. Sir Moleswork, in 1854, pointed out that in "consequence of our being at war with Russia I hold that we are more bound in honour to pay this debt than if we were at peace (…)".

[358]MCNair has declared that: "(…) abundant evidence that treaties which in

treaty reports within the same clause[359]. This indicates that the article in question establishes what the previous art. 3 affirms, i.e. the general principle which does not automatically extinguish and/or suspend treaties following the outbreak of hostilities. Some states were obviously against this position[360] given that the article represented a debate where the ILC actually

express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination (…) there were in existence at the outbreak of the First World War a number of treaties (to which one or more neutral states were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856, and certain of the Hague Convention of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other prize courts turned upon them (...)". See also the Third Restatement of the Law affirms that: "(…) agreements governing the conduct of hostilities survived, since they were designed for application during war(…)". ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), 2005, op. cit., par. 66.

[359]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 7.

[360]Chile (A/C.6/63/SR.22, par. 13) Poland (A/CN.4/622): "(…) the provisions of art. 4 of the final project was included in the art. 5 of the first draft drafted by Prof. Brownlie, who does not fail to observe as already mentioned the Harvard Research Draft, in his art. 35 a) established that: "a treaty which expressly provides that the obligations stipulated are to be

repeated Art. 7 of the old draft articles[361]. Art. 4 appears as a provision that was useless and which plays a fundamental role and constitutes an instrument not only of clarity but also of an interpretation that should follow all the steps and not just the relative one in an autonomous way.

Art. 5 followed the spirit of art. 4 thus completing the path that follows the treaty and which provides for extinction, suspension and withdrawal in a susceptible way. It formulates in a generic way the anticipation and the possibility of an application which follow articles 6 and 7 and which date back to the interpretation of the same[362].

Especially, art. 5 entitled: "Application of rules on treaty interpretation" states that "(…) the rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the

---

performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties (…)".

[361]See, ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), 2005, op. cit., par. 55: "(…) in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties (...)" par. 55.

[362]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 8, par. 1.

event of an armed conflict (...)". The lack of relevant clauses requires the application of general rules which are part of the interpretation of the treaties and pursuant to Articles 31 and 32 VCLT (Channg-Tung, Garcia, 2019). The ILC has clarified its position regarding the general nature of the rules of international law given that Articles 31-33 VCLT are part of customary law and not all states are part of the accession and this instrument is actually a general political choice of the ILC itself presented not to include the instruments that were explicit in references of other conventions in this regard. The draft of 2011 does not report the intention of the parties. The subjective criterion of the intention of the parties raises a number of criticisms and obstacles for some. The criterion is interpreted as a reintroduction of a subjective criterion despite the fact that the VCLT chose a list of criteria that had an objective character[363].

[363]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 8, par. 3.

The interpretation of a treaty is accepted through Art. 31VCLT (Dörr, 2018) of a systematic interpretation that refers to the context of the treaty and the teleological one that is part of the object and purpose of the same. We cannot, however, identify the interpretation of the treaty which through two criteria resorts to other criteria thus finding the intention of the parties. An intention as a main criterion that reduces from the definitive project the subsidiary criterion that conditions the use of main criteria. A criterion that clarifies: "(...) the process of making the determinations set out in Article 31 of the Vienna Convention (...)". The intention of the parties is presented as guidelines for the states parties[364]. Therefore the ILC has tried to resolve the effects of armed conflicts with pre-war conventional law through the help of subjective criteria for the interpretation of the will of the parties. A principle that is linked to the law of treaties and to the VCLT guaranteeing an effective application of the principle of pacta sunt servanda and as provided for in the convention[365].

[364]Art. 5 of the non-definitive version of the draft of articles: "(…) among other things supported by both speakers, at its lett. a) provided that: "(…) in order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to the intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties (...)".

[365] See, ILC, Fifty-eighth session, Second report on the effects of armed

The intention of the parties cannot also be used as a basis for termination, suspension of treaties due to the agreement of the parties, non-fulfillment, supervening impossibility of execution and fundamental change in circumstances. Positions that are also held by various states such as: China[366], Greece[367], India[368], Romania[369], the United Kingdom, etc., while others, such as Austria[370], Bulgaria[371], Colombia, France[372], Japan[373], Portugal[374] and the United States did not accept it.

In this topic and after the declarations of various states we recall the words of Sir Cecil Hurst who stated: "(...) it is the character of the treaty, or of the particular provision in a treaty, which is

conflict on treaties (by I. Brownlie), op. cit., par. 19. ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 47. Prof. I. Brownlie, affirmed that: "(…) given the character of the subject matter (as a part of the law of treaties), it is unrealistic to assert that the role of intention should be marginalized (...)".

[366]See, A/C.6/61/SR.18, par. 47.

[367]See, A/C.6/60/SR.19, par. 37.

[368]See, A/C.6/61/SR.19, par. 28.

[369]See, A/C.6/60/SR.19, par. 41 and 44.

[370]See, A/C.6/60/SR.18, par. 27.

[371]See, A/C.6/61/SR.18, par. 23 and 65.

[372]See, A/C.6/60/SR.11, par. 75.

[373]See, A/C.6/60/SR.20, par. 22.

[374]See, A/C.6/61/SR.18, par. 77 and A/C.6/60/SR.20, par. 32.

regarded as the important element in determining the effect which an outbreak of war will have upon it (…). The true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded (Hurst, 1921-1922)(…). The problem which must be faced by international lawyers is that of formulating a series of presumptions to meet the cases where the words in the treaty itself do not show clearly what was the intention of the parties at the time when they made it (…)" (Hurst, 1921-1922). Fitzmaurice also expressed himself by declaring that: "(...) the application of both the subjective and objective criteria was the idea that the question of whether treaties survived or not depended both on the nature of the treaty and on the intention of the contracting parties (…)" (Fitzmaurice, 1948)[375].

The opponents of the use of the criterion of the intention of the parties, base the problem on the same verification[376], making it impossible for the parties to have foreseen other "attitudes" to obtain in this regard. By also examining the practice we cannot arrive at support for the theory of the intention of the parties

[375]"(…) one for decision in each case on the basis of the nature of the treaty and the intention of the parties regarding it (...)".

[376]ILC, Fifty-ninth session, Third report on the effects of armed conflict on treaties (by I. Brownlie), 2007, A/CN.4/578, par. 24.

despite the fact that the extinction was shared by the entire international community and dates back to a precise rule.
Within this context, the rapporteur Caflisch himself followed the same path of logic if we call it that because of the general and non-specific nature of the rules of international law. Even if we cannot interpret the treaty through the criteria of art. 5, we can also take into consideration another path, that of other criteria. The ad hoc article should be interpreted in collaboration with art. 3 and on the assumption that each armed conflict is unique and does not automatically generate the extinction, suspension and operation of a treaty before or during the conflict.
In our opinion, art. 6 differs from art. 5, which includes an assessment of an intrinsic nature of the treaty concerning the application of the rules of international law on the interpretation of treaties as factors external to the treaty. Therefore, the same is entitled: "Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension" and also states that: "(…) to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including: a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and b) the characteristic of the armed conflict, such as its territorial

extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement (...)"[377].

This is an article that includes some categories of factors that are relevant to the evaluation of the fate of the treaty. On the one hand, the factors that are not understood in an exhaustive way given that art. 6 makes available and considers "all the relevant factors" without including letters a) and b).

However, the identification of factors that are relevant and considered by letters a) and b) remain open and without considering the factors that are identified in the same way in all cases. For example, whether one factor is more relevant than another depends on the treaty and/or conflict[378].

The list of this type does not include and consider factors that achieve an evaluative control that adheres to reality and also to practice. In particular, letter a) includes a list of factors, such as the nature of the treaty without exhaustively being part of it and provide other indications that precisely evaluate the nature of the treaty itself, the objective, the matter, etc. Within this context, the ILC provides in a generic way and decides to dedicate to art.

[377]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

[378]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 9, par. 2.

7 the different types of treaties according to the matter they regulate and which presents the probability of continued force after the outbreak of an armed conflict. However, according to letter b) of art. 6 the territorial extent is considered as a fundamental element for a conflict that takes place not only on the land but also on the sea. The objective of the articles is the inclusion of the discipline of non-international armed conflicts given that it is reported that the degree of outside involvement is an element that is necessary to favor the stability of the treaties and thus also limiting the possibility to extinguish, suspend the operation of the treaties. The greater the participation of third states in a non-international armed conflict, the greater the possibility that the conflict also produces the related abrogation and suspension of treaties[379].

Identify criteria a) and b) of art. 6 and not just art. 5, letter. b) of the draft before 2011 determines[380] the criteria examined which were the subject of discussion by some states. The main critical

[379]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 10, par. 4.

[380]According to the article: "(…) in order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to the nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty (...)".

points concern the "nature and extent of the armed conflict", thus maintaining that the notion ends up creating some problems and not resolving situations of the past[381]. For some states[382] the elimination of phrases from the draft articles conflicts with art. 2, letter. b) of the same draft. These are doubts that present the criteria of nature and armed conflict in partem as abstract elements to be included in the draft articles[383]. The rapporteur Caflisch already argued in this regard that: "(...) the criteria in question since (...) the contradiction between art. 4 of the previous draft and art. 2 lett. b) of the same is not precise (...) aimed at expanding the list of indications necessary for the purposes of evaluating the fate of pre-war conventional law. Belarus proposed to add new evidence, such as the fundamental change of circumstances and the impossibility of execution (...)"[384].

[381]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 43.

[382]See in particular: Austria (A/C.6/63/SR.16 par. 36), Belarus (A/C.6/63/SR.16 par. 40) and Iran (A/C.6/63/SR.18 par. 56).

[383]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 45. in the same opinion see also China (A/CN.4/622).

[384]See, A/C.6/63/SR.16 par. 40. To tell the truth, despite this, Cyprus had proposed to include also the violation of the treaty. See in this regard A/C.6/63/SR.19 par. 8; as well as ILC, Sixtysecond session, Report on the

Attempts to broaden their application was unsuccessful (Hollis, 2020)[385]. Other states have put forward the proposal to provide according to letter. b) of art. 4 the indication of a list of clues which contains the final project in a non-exhaustive manner. In particular, articles 3 and 7 define and constitute the central node of the position. A position that identifies the fate of the treaty in a necessary way by resorting to this that is foreseen in the matter of the treaty itself. The absence of an ad hoc provision, specifies that it resorts to general rules of international law which deals with the interpretation of treaties and which are contemplated in art. 5 of the project. Through the use of art. 5 and in collaboration with art. 6 is clarified that the extraneous elements of the treaty identified in this article are oriented autonomously towards one or another solution.

Which treaties remain and in what areas?

The principles of ex articles 4, 5 and 6 of the project of 2011 determine the conventional law which has a pre-war nature. The

work, 2010, op. cit., par. 220.

[385]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 46. See, China (A/C.6/63/SR.17 par. 54), El Salvador (A/C.6/63/SR.17 par. 12) and Israel (A/C.6/63/SR.18 par. 33).

various criteria that are taken into consideration according to the ILC take into account the specificity of various subjects by deciding to foresee the continuous objective of the three articles considered. An objective that contains a list of treaties in the specific subject to be regulated which continue to be operational even after the outbreak of an armed conflict.

We continue with art. 7 of the project entitled: "Continued operation of treaties resulting from their subject matter" which states that a list of treaties containing an implication that continue in operation, in whole or in part, during armed conflict, is to be found in the annex of the present draft articles[386].

Article 7 concerns treaties that regulate matters that are implicated by their nature in the existence of an armed conflict. Thus, as an evaluative fruit of practice[387], the international

[386]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

[387]Greece, A/C.6/63/SR.18, par. 43 and 44: "(…) truth, one state has asserted that the practice to which the project of articles would refer would be, for the most part, that of the common law countries (…)". ILC, Fifty eighth session, Second report on the effects of armed conflict on treaties (by I. Brownlie), op. cit., par. 34: "(…) project of articles, instead, as the rapporteur Caflisch pointed out, does not take into consideration only the practice of common law states, but takes into account both the practice and the doctrine of all states (…)". ILC, Fifty-ninth session, Third report on the effects of armed conflict on treaties (by I. Brownlie), cit., par. 48: "(…) the

community regards the effects of armed conflicts on treaty law, thus providing a list which is indicative of the categories of treaties and which is also regulated during the armed conflict[388]. Thus, a regulated matter is created which implies that the treaty survives the war and the list indicates that it considers the matter regulating the treaty to be mandatory for the categories that are part of the relevant annex.

Surviving treaty law even after the outbreak of war is interesting given that this takes into consideration provisions of the treaty that are separable[389]. Specifically, the rapporteur reads art. 7 also by virtue of the provisions of art. 10, which concerns precisely the separability of the provisions of the treaty as well as examines in more depth the relationship between articles 4, 5, 6 and 7 establishing the criteria, indications and factors that give substance to the general rule of non-automatic extinction (dictated by art. 3). Their application therefore leads to the determination of the total or partial survival of the treaty[390].

---

identification of the practice of the relevant states in this matter is anything but easy (…)".

[388]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 21, par. 4.

[389]See, A/C.6/63/SR.18, par. 43.

[390]See, A/C.6/63/SR.18, par. 44.

Taking into consideration the categories of the treaties and what the rapporteur stated, one immediately notices the absence of any reference to jus cogens[391]. The ILC could not eliminate the character of jus cogens both qualitatively and quantitatively given that the categories of treaties that are foreseen and included in the annex are part of a group in the matter that respects the jus cogens and the cardinal principle of the structure of the international law which does not concern the subject matter but the elements of public international law. When we talk about jus cogens we are talking about rules that have a hierarchical position of a supreme and dominant nature that respects the sources of international law at the outbreak of armed conflict. The inclusion of the list is small and unnecessary. In particular, articles from 3 to 7 in no way do they include all the principles that are part of respecting treaties of all types and especially those of jus cogens[392].

[391]See especially: Portugal (A/CN.4/622) and Hungary (A/C.6/63/SR.17, par. 33).

[392]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 21, par. 3.

The listing of the item in question created points of discussion at the ILC as the United States declared its concern over the categorization of the item under investigation during the 62nd session of the General Assembly. The United States stated that the factors suitable for arriving at a conclusion for a treaty and for its clauses are the list of these factors that will have to be taken into consideration during the outbreak of an armed conflict[393]. For other states the article was superficial[394]. In this regard, the rapporteur Caflisch stated that art. 7 represented that the provision of the draft articles is fundamental without explaining the reasons for this position and above all without clarifying the determination of pre-war conventional law[395].

[393]See, A/C.6/60/SR.20, par. 34; ILC, Fifty-eighth session, Second report on the effects of armed conflict on treaties (by Prof. I. Brownlie), op. cit., par. 35: in particular, the United States affirms that: "(…) art. 7 (…) is problematic because attempts at such broad categorization of treaties always seem to fail. Treaties do not automatically fall into one of several categories (…) it would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to states on how to proceed (...)".

[394]Poland (A/CN.4/622). ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 58.

And the question that arises now is: What are the categories of treaties that will have to be taken into consideration when an armed conflict breaks out?

(Follows): Treaties on humanitarian law and those on the law of armed conflicts

Let's start with the non-limitation of the category of treaties that are applicable to an armed conflict that do not have the object of the law of armed conflicts, including those relating to humanitarian law. These treaties concern the law of armed conflicts which are concluded with the aim of having application during an armed conflict and which are part of the rules of international humanitarian law[396]. Let us not forget that an armed conflict has no effects on international humanitarian law[397]. The non-application of international humanitarian law to non-international armed conflicts is an open problem, discussed many times both by doctrine and at a political level (Meron,

[395]Colombia (A/CN.4/622). See also the positions of Nordic countries, A/C.6/63/SR.16, par. 32).

[396]According to McNair: "(…) remarquer que la règle d'après laquelle des traités réglementant l'état de la guerre restent en vigueur pendant la guerre et ne demandent point de renouvellement exprès après la guerre (...)".

[397]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, A/CN.4/552, pp. 15.

2000; Roithmaier, 2023)[398].

Within this context, international jurisprudence is taken into consideration as for example in the 1996 case on the legality of the threat or use of nuclear weapons (Gardam, 2001; Zyberi, 2007; Liakopoulos, 2020b; Aledo, 2021)[399] which clarified the principles of humanitarian law that are applicable during an armed conflict as well as international law without leaving out the principle of neutrality, where its content is applicable to international armed conflicts as well as to any type of weapons that are used according to the conduct of hostilities.

Armed conflicts cannot create effective results of an extinct nature, suspending treaties that come from the category under investigation and without judging that the law of armed conflicts continues to apply the lex specialis. It is applicable that the law of armed conflicts continues to consider that the outbreak of an

[398]"(…) the Protocol dealing specifically with non-international armed conflict, Protocol II, requires a very high threshold to trigger its applicability and has seldom been applied (…) the characterization of the armed conflict as a non-international one can have the effect of rendering all humanitarian law inapplicable (...)". ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., par. 22.

[399]ICJ, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1995-1996, ICJ Reports 1996, pp. 226, 89ss.

armed conflict and the law of armed conflicts is also part of the category treaties related to the protection of the human person, to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operational in the event of armed conflict[400].

A position that is attentive to the rapporteur Caflisch himself who decided not to add the types of treaties to a category that includes all types of conventions. Also taking as a basis that the treaties speak to us through a declaration, rule, creation, status of a permanent regime of rights that include and establish, modify the territories of maritime borders. In the case of an armed conflict, the treaties which have as their object the cession of territories are union treaties which have the aim of creating and modifying the borders which are intended to be operational and in force. Within this context, we recall from the relevant jurisprudence of the Permanent Court of Arbitration, the North Atlantic Coast Fisheries case (Lansing, 1910)[401] which did not take into consideration what the British government said, stating that: "(…) international law in its modern development

[400]See, Switzerland A/CN.4/622.

[401]Arbitral Tribunal of the Permanent Court of the Hague, case North Atlantic Coast Fisheries of 7 September 1910.

recognizes that a great number of treaty obligations are not canceled by war, but at most suspended by it (...)"[402]. Even the US Court, in the Meyer's Estate case of 1951, established that the: "(…) authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war (…)"[403].

As for borders, Art. 62, paragraph 2, letter. a) VCLT (Channg-Tung, Garcia, 2019) highlighted an exception. An exception that denied the extinction, the withdrawal of a treaty that invokes and establishes the border (Nolte, 2013)[404]. This is a position that provided for the Vienna Convention on the succession of states in the 1978 treaties, where art. 11 notes that: "(...) a succession between states is not capable of prejudicing and producing effects either on a border established by a treaty, or on the obligations and rights established by a treaty regarding a border

[402]Court of Arbitration, North Atlantic Coast Fisheries case, op. cit., pp. 167ss.

[403]Court d'Appeal of California, case Meyer's Estate, 1951: https://casetext.com/case/estate-of-meyer

[404]See, Art. 62, 2 lett. a) of VCLT.

(...)"[405].

The category of boundaries under consideration presents some problems that have to do with the limits that appear to be uncertain. Compliance with guarantee treaties, the objectives of an armed conflict depends on the object and purpose of the treaties themselves. Thus it is highlighted that: "(…) treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status (…)" (McNair, 1961).

Cession treaties creating permanent rights. Treaties do not have a permanent nature but only their own rights (Hurst, 1921-1922)[406]. Such rights will enforce and fuel subsequent armed conflict[407].

---

[405]See Art. 11 of the Vienna Convention of 1978 on the succession of states affirms that: "(…) a succession of states does not as such affect a) a boundary established by a treaty; or b) obligations and rights established by a treaty and relating to the regime of a boundary (...)".

[406]According to Hurst: "(…) which flow from the treaties which are permanent, not the treaties themselves (…)".

[407]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 23.

(Follows): Multilateralism in treaties and the normative nature of their content

When we talk about multilateralism we highlight the multilateral treaties that have normative content ("multilateral law-making treaties", "traités multilatéraux normatifs") indicating that: "(…) treaties create rules of international law for regulating the future conduct of the parties without creating an international regime, status or system (…)" (McNair, 1961)[408]. Within this family there are treaties that create rules regarding nationality, marriage, divorce and the reciprocity and execution of sentences (Starke, 1963).

These treaties lack the onset of an armed conflict since the member states participate in a conflict that has the same character. It is true that these treaties provide for a general regulation that deals with drugs, health, civil procedure, protection of intellectual and industrial property, etc.

Speaking of law-making we immediately bring to the table a very problematic term given that the definition is not too precise and clear. The treaties create in international law and in practice these types that guarantee a partial application. These include

[408]"(…) it is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerent. The intention to create permanent law can usually be inferred in the case of these treaties (...)".

treaties on public health, of the Second World War as well as those on slavery[409]. In particular, the Scottish Court of Session, with a 1976 ruling (Masinimport v. Scottish Mechanical Light Industries Limited (Zrlic, 2019)[410] stated that: "(...) the survival of an armed conflict of a multiparty law-making treaty represents a principle of public international law (…)". This aspect was also considered during the preparatory work for the Vienna Convention on the succession of states with respect to treaties. Art. 16 of the same (...) establishes a general principle of tabula rasa according to which a newly formed state is not bound by treaties previously in force in the territory to which the succession of states refers. In the commentary, Art. 16 of ILC held that- on the basis of state practice-the aforementioned principle of tabula rasa does not suffer any exception, not even

[409]According to Mr. Ushakov, a member of the ILC of international law: "(...) the introduction of the art. 12 bis (...) this type of treaties were defined as: "international agreement which is by object and purpose of worldwide scale, open to participation by all States, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (…)".

[410]Court of Scottish Session, case Masinimport v. Scottish Mechanical Light Industries Limited of 30 January 1976: https://vlex.co.uk/vid/masinimport-v-scottish-mechanical-803848933

with regard to multilateral law-making treaties[411].

Treaties that consider survival after the outbreak of an armed conflict as a case where practice has not reached a single path. In this regard the United States have cultivated the path that believed that the survival of such treaties of armed conflicts according to the Legal Advisor of the US Department of State, Ernest A. Gross, in a letter of 1948 are: "(...) non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this government has not denounced in accordance with the terms thereof". These are still in force in respect of the United States and the existence of a state of war between some of the parties to such treaties did not ipso facto abrogate them, although it is realized that, as a practical matter, certain provisions might have been inoperative. The view of this government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, belligerents and neutral parties, and between neutral parties (Bowman, Kritsiotis, 2018; Hollis, 2020). He considered that following the signing of the peace

[411]See Report of the International Law Commission on the work of its twentysixth session (A/9610/Rev.1). Yearbook of the ILC, 1974, p. 212.

treaty with Italy in 1947, the multilateral treaties of a non-political nature stipulated between the two states in question and in force at the time of the outbreak of hostilities should be considered "new in force (...)"[412].

In this regard, also the United Kingdom, through, the Foreign Office, in a letter dated in 1948, took a position and responded that: "(...) the fate of multilateral treaties of a technical and/or non-political nature, maintained that in the peace treaties with Italy, Finland, Romania, Bulgaria and Hungary, no mention is made of such treaties (…)". According to international law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It did not believe that multilateral treaties automatically cease to be in force upon the outbreak of hostilities, and this, is particularly true in the case of treaties to which neutral states are parties[413].

Multilateral treaties, given their technicality and less political nature not of the content but of the way in which they are made, are addressed to the belligerent states. In practice, they represent the same ones that are also suspended during an armed

[412]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., par. 17.

[413]See for example the 1919 International Air Navigation Convention.

conflict[414]. In other words, the category of multilateral lawmaking treaties is included in the list of treaties that regulate subjects where the principle of extinction follows the outbreak of an armed conflict and subsequently survives it as a logical consequence.

(Follows): Treaties of friendship, navigation and commerce as agreements of private rights

When we talk about treaties of friendship, navigation, trade, and in general of agreements of private rights we are not talking about normal treaties of a commercial nature (Walker, 1957-1958).

[414]Fitzmaurice affirms that: "(…) multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The matter is actually not quite so simple (...)". See also: ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., par. 18.

These friendship treaties still survive when a situation of armed conflict arises. The relevant clauses that deal with the status of foreign subjects continue to operate even after the outbreak of a war. The probable clauses that are contained in trade treaties are in theory subjected to an extinguishing effect of the conflict. The principle of severability of contractual provisions requires the survival of the relevant clauses.

The treaties that are part of the category under investigation are oriented in favor of how to maintain the outbreak of an armed conflict (McNair, 1961). The relative safety of citizens and the interests of private individuals involved represent the main reasons that reserve the status of the category of this type of treaties[415]. Within this context, the courts also support the position that affirms the permanence of these types of treaties after the outbreak of an armed conflict. The practice is favorable to Art. 7 of the draft of 2011 and related to the types of treaties. Already the English Court of Chancery in the Sutton v. Sutton case[416]: had to do with Art. IX of the Jay Treaty which was

[415]ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), op. cit., par. 77.

[416]Court of Chancery, Sutton v. Sutton, 1830: https://casetext.com/case/sutton-v-sutton-51. See also: ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, op. cit., p. 28, par. 30.

concluded between the United States and Great Britain in 1794 and by which the citizens of the two states continued to be property owners in the territory of another contracting party. The court thus stated that: "(...) the contracting parties intended that the treaty in question should have permanent operation, regardless of the existence of an armed conflict (…)". In the Techt v. Hughes (Sloss, 2016)[417] case that has to do with the relevant Treaty of Commerce and Navigation between the United States and Hungary of 1829, judge Cardozo stated that: "(...) in the Society for the Propagation of the Gospel v. Town of New Heaven case[418], a clause regarding real property had been survived the War of 1812, there would have been no reason to depart from this ruling (…)". The survival of clauses regarding the property rights of natural persons were also supported in the State ex rel. Miner v. Reardon case (Stanley, Lesser, 1953)[419], concerning Art. 14 of the Treaty between the United States and Prussia of 1828 (…)". Even in Clark v. Allen the survival of the

[417]Court of Appeal of New York, Techt v. Hughes of 8 June 1920, 128 N.E. 185, 192 (N.Y., 1920): https://casetext.com/case/techt-v-hughes-1

[418]Supreme Court of United States: The Society for the Propagation of the Gospel in Foreign Parts v. The Town of Newhaven and William Wheeler, 182: https://supreme.justia.com/cases/federal/us/21/464/

[419]Supreme Court of Kansas, State of Kansas v. Reardon, 1926, 120 Kan. 614, 245 p. 158 (1926).

war as a clause of 1947[420] states: "(…) around art. 4 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany of 1923, which allowed the citizens of one party to succeed the citizens of the other, the Court, (...) established that the outbreak of a war does not abrogate or necessarily suspends the provisions of a treaty (…)". In the Bussi v. Menetti[421] case it was stated that: "(...) the principle of the survival of the treaties of friendship, commerce and navigation (...) concerning a French landowner who, for health reasons, needed to live on his property which he had rented to a Italian tenant, ended in first instance with a decision which recognized that the Treaty of Establishment signed between France and Italy in 1930 had been abrogated following the outbreak of hostilities between the two countries, which occurred ten years later (...)". This was overturned by the French Court of Cassation, which had the opportunity to rule that this type of treaties are not automatically abrogated or suspended following the outbreak of an armed conflict. The French Court highlighted that "treaties of purely private law nature, which do not involve any intercourse between the enemy parties and which have no connection with the conduct of hostilities-such as

[420]Supreme Court of United States States, Clark v. Allen, 1947, 331 U.S. 503 (1947): https://supreme.justia.com/cases/federal/us/331/503/

[421]French Court of Cassation, Bussi v. Menetti of 5 November 1943.

conventions relating to leases-are not suspended merely by the outbreak of war (...)"[422]. Continuing with the district court of Rotterdam, in the Gevato v. Deutsche Bank case (Wilmshurst, Breau, 2008)[423], which reiterated that: "(...) the provisions of the 1905 Hague Convention on civil procedure were not to be considered abrogated following the outbreak of the Second World War, even if, in this case, considered that the same convention should be considered to have returned into force by virtue of the Peace Treaty stipulated with Italy in 1947 (...)". In the same spirit, in 1951 the Court of Appeal of Aix, in the Ets Cornet v. VVe Gaido case[424] stated that: "(…) the International Organization of Labor of 1925 should not be considered automatically extinguished following the outbreak of the war (…)". Even the Scottish Court of Session, in Masinimport v. Scottish Mechanical Light Industries Ltd[425], stated: "(...) that multilateral agreements on arbitration would survive the

[422]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, op. cit., p. 29, par. 34.

[423]Holland, Rotterdam District Court, Gevato v. Deutsche Bank of 18 January 1952.

[424]Court of Appeal of Aix, Ets Cornet v. Vve Gaddo, 1951.

[425]Scottish Court of Session, Masinimport v. Scottish Mechanical Light Industries Limited, 1976: https://vlex.co.uk/vid/masinimport-v-scottish-mechanical-803848933

outbreak of war (...)". Same position, was also obtained by the International Court of Justice (ICJ) of 2003, particularly, in the Oil Platforms case (Helgeson, Lauterpacht, 2000; Drahozal, Gibson, 2007; Gordon, 2009; Liakopoulos, 2020b)[426] which established: "(...) that the Treaty of Amity, Economic Relations and Consular rights concluded between the United States and Iran in 1955 had to be considered operational despite the outbreak of hostilities in 1979 (...)" (Orakhelashvili, 2010; Denza, 2016). The same court in the Military and Paramilitary Activities in and against Nicaragua case (Sobenes Obregon, Samson, 2017)[427] maintained that: "(…) treaties concluded between states who subsequently become belligerents are not necessarily suspended by war (…)".

As a less expressive jurisprudence and in the same direction is the Supreme Court of the United States, in the Karnuth v. United States case of 1929, which stated that: "(…) Art. III of the Jay Treaty, concerning free access for citizens of the contracting parties to the territory of the other (...) having sanctioned the abrogation of the same following the War of 1812 and that the

[426]ICJ, Iran v. United States of 6 November 2003, in ICJ Reports, 2003, par. 161.

[427]ICJ, Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) provisional measures, order of 10 May 1984, ICJ Reports 1984, p. 179, par. 24.

treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace (...)"[428]. Also in the Ex parte Zenzo Arakawa case (David, Macdonald, 1955; Mcintryre, 2012)[429] of 1947, the District Court of Pennsylvania noted that: "(…) Art. I of the Treaty of Commerce and Navigation concluded between the United States and Japan in 1912 (…), and the treaties of commerce and navigation, given their intrinsic incompatibility with the existence of a state of war, they would fall into the last categories (…)". The French Court of Cassation, in the aforementioned Lovera v. Rinaldi case (Herzog, Weser, 2014)[430] argued in relation to the 1930 Treaty of Establishment which was stipulated between France and Italy and which had established: "(...) that the convention in question had to be considered lapsed following the outbreak of the war, as it appeared to be

[428]Supreme Court of Unitd States, Karnuth v. United States, 1929, 279 U.S. 231 (1929): https://supreme.justia.com/cases/federal/us/279/231/

[429]US District Court of Pennsylvania, Ex parte Zenzo Arakawa, 1947: https://law.justia.com/cases/federal/district-courts/FSupp/79/468/1757335/

[430]French Court of Cassation, Plenary Assembly, Lovera v. Rinaldi, 1949.

incompatible with it (…)". It confirms its ruling on the treaty in question a few years later. In the Gambino v. Consorts Arcens case "(...) the treatment to be reserved for Italians by virtue of Art. 13 of the convention was to be considered incompatible with the conduct of an armed conflict (…)"[431].

(Follows): Human rights treaties

Human rights treaties under the ILC are an extension of the relative status that has been considered by the treaties of amity, commerce and navigation[432]. Protecting and respecting human rights affirms the fundamental rights that are mandatory to international law as well as to the norms of jus cogens. Provisions that cannot be derogated in the field of human rights treaties continue to be applied even during the outbreak of an armed conflict. These provisions are part of the codification of jus cogens (Vöneky, 2000; Reichel, Albanese, 2013).

In this regard, we recall the jurisprudence of the ICJ which in the advisory opinion of the Legality of the Threat or Use of Nuclear Weapons case affirmed that: "(...) the protection of the

[431]French Court of Cassation, Gambino v. Consorts Arcens, (20, 599 of 11 March 1953).

[432]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., par. 48.

International Covenant of Civil and Political Rights does not cease in time of war (Liakopoulos, 2020b)[433]. Derogable provisions of these types of treaties, it is not clear, in fact, whether can be considered to survive a conflict. They, however, can be considered applicable despite the onset of an armed conflict[434].

Human rights treaties are linked to Art. 11 of the draft articles[435], dealing with armed conflicts over treaties. Art. 11 takes into consideration the provisions of international treaties that protect human rights that cannot be abrogated or suspended. These are provisions relating to the protection of human rights which are part of other types of treaties and which continue to be operational when the treaty must be extinguished, even partially suspended.

(Follows): Treaties relating to environmental protection at the international level

[433]ICJ, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, op. cit., par. 25.

[434]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., parr. 33-34.

[435]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

Environmental protection is also part of not only the general sector of international but also of specific protection. Within this specificity come the moment that armed conflicts arise and treaties receive more interest and development. The effects of armed conflicts relate to the effects of war on treaties in general and to other types of treaties. The issue is not about the types of treaties that are enforceable during a war, but about the obligations they contain and which they deem to be limited during the conflict (Afriansyah, 2011).

In particular, the ILC[436], after work that began in 2016, attempted to present a new draft entitled: "Draft principles on protection of the environment in relation to armed conflicts" which is adopted in the seventy third session of the ILC of 2022 and submitted to the General Assembly as part of work of the same session. In the present, new text of the adopted draft principles, the reference of notion of "natural" is still: "(...) in square brackets as the Drafting Committee is yet to decide among three possibilities: (i) use only the term "environment", (ii) use only "natural environment" or (iii) use "natural environment" where the principle relates to "natural environment" during armed conflict because the law of armed conflict employs that term (…)"

[436] https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf

(Arajärvi, 2017; Dam-de Jong, Sjöstedt, 2021). The issue it should be re-examined and decided in many future sessions under the title: "Principle II-1: General Protection of the (Natural) Environment During Armed Conflict Draft principle II-1" which affirms: "(...) the general protection of the (natural) environment during an armed conflict" that is divided into three paragraphs, of which paragraph 1 is relevant during all three phases. The adopted draft text affirms that: "(...) 1. The (natural) environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. 2. Care shall be taken to protect the (natural) environment against widespread, long-term and severe damage. 3. No part of the (natural) environment may be attacked, unless it has become a military objective (…)". In particular, paragraph 3 of draft principle II-1 is based on paragraph A of rule 43 of an International Committee of the Red Cross study, entitled: "Customary International Humanitarian Law (ICRC Study)"[437] affirming that the environment has the same treatment as a civilian during an armed conflict. We noticed also a difference between the adopted draft text and the study under paragraph 2 of the draft principle II that we can read: "(…) unless it has

[437] https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law

become a military objective", instead of "unless it is a military objective (...)" of paragraph A, rule 43 of the ICRC Study. We continue with the draft principle II-4 entitled: "Attacks against the (natural) environment by way of reprisals are prohibited" that take in consideration Art. 55(2) of the Additional Protocol I.
In our opinion, we can say that the majority of these types of treaties do not contain precise provisions and that they do not expressly regulate the applicability of a treaty which hypothesizes that the armed conflict and the jurisprudence, if it exists in this regard, has the task of tracing the related boundaries. We immediately recall in question from the ICJ the Legality of the Threat or Use of Nuclear Weapons case[438] which stated that: "(...) took note of the fact that the environment, nowadays, is under threat and, for this, the use of nuclear weapons by states could constitute a real catastrophe (…)". It is therefore clear that states have a general obligation to ensure to future generations a clean environment aimed at pursuing the health of their citizens. Such objectives must also be guaranteed through the control of respect for the environment also by other states (Van Dijk, 2022)[439]. Not all treaties that are part of

[438]ICJ, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, op. cit.

[439]ICJ, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, cit., par. 29: "(…) Art. 35 par. 3 of the I Protocol Additional to the Geneva

environmental protection are affected by the outbreak of an armed conflict (Simonds, 1992; Rayfuse, 2014).

This category includes treaties that provide for their application even in cases of armed conflict. They make available in a partial way during an armed conflict, although the fate of the war it considers the same is not expressed, the content that is incompatible with the conflict itself. Such treaties require notifications, consultations in an armed conflict and are often incompatible with military secrets and the use they make of them.

They are made available in a partial way during an armed conflict, although the fate of the war considering the same is not expressed, and the content is incompatible with the conflict itself. Such treaties require notifications, consultations in an armed conflict and are often incompatible with military secrets and the use they make of them.

(Follows): International waterways, facilities and services and aquifers

---

Conventions of 1949, moreover, it guarantees further respect for the environment and provides for a general obligation to protect the environment against serious and widespread environmental damage (…)".

As regards the treaties that are related to international waterways and everything that is part of this category, are rights of a permanent regime. The provisions that are contained in the same treaty[440] are part of treaties on the subject which are expected to be suspended during an armed conflict[441].

According to Fitzmaurice: "(…) conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties (…)". These may be partially suspended but they continue in existence and their operation automatically revives on the restoration of peace (Fitzmaurice, 1948).

---

[440]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., par. 59.

[441]See Art. 15 of the Statute on the Regime of Navigable Waterways of International Concerns of 1922, whih affirms that: "(…) does not prescribe the rights and duties of belligerents and neutrals in time of war (…) continue in force in time of war so far as such rights and duties permit". Similarly, the art. 29 of the Treaty on the Law of Non-Navigation Uses of International Watercourses of 1997 provides that: "(…) international watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules (...)".

Treaties that are part of aquifers of a transboundary nature and the installations they have for the protection of the rules and principles of international law are applicable in international and internal armed conflicts and cannot be used to principles and rules[442]. And all this given the need for water protection as a necessary good for the types of treaties that continue to be in force despite the fact that the armed conflict has broken out and continues on time.

(Follows): Treaties establishing international organizations

International organizations that are created by treaty enjoy legal personality separate from members who are part of the same organization[443]. In this case, they cannot abrogate or suspend interventions in an armed conflict according to the discipline of the matter which is incompatible with war[444]. These are treaties that seek to carry forward the creation of a new subject to international law and where the rules created have survived. The

[442]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., par. 64.

[443]ICJ, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, cit., par. 25.

[444]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., par. 66.

same treaty that expresses the fate of an insurgency of a war phenomenon is not prohibited.

(Follows): Treaties relating to diplomatic and consular relations

Treaties that deal with the matter of diplomatic and consular relations, remain operational even after the outbreak of an armed conflict (Chinkin, 1981-1982)[445]. A position that immediately makes us think of the 1961 Vienna Convention on diplomatic relations which takes into consideration its application even in times of war. Already Art. 24 of the convention just cited establishes that: "(...) the archive and documents of the mission are inviolable at all times and wherever they are". Therefore, these archives are inviolable even in the event of war (Denza, 2008). Embassies also remain open during an armed conflict.

Art. 44 of the same convention provided: "(...) the obligation for the receiving state to guarantee - in the event of war - facilities to allow persons benefiting from immunity to leave its territory". This implicitly admits its applicability even in the case of armed conflict. Art. 45 lett. a), states that: "(...) in the event of a breakdown in diplomatic relations (even temporary) or if a mission is recalled, the receiving state is obliged to respect and

[445]ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), 2005, op. cit., par. 112.

protect the rooms, assets and archives of the mission, even in the event of the onset of an armed conflict (…)".

Position which has also been affirmed by jurisprudence. It is noted from the ICJ in the case of the US diplomatic and consular personnel taken hostage in Tehran where it was established that: "(...) the fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961. Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the member of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving state (…)" (Falk, 1980; Chinkin, 1981-1982; Liakopoulos, 2020b)[446].

As well as, treaties having to do with consular relations are not abrogated or suspended at the time or after an armed conflict breaks out (Lee, 1991). The Vienna Convention on Consular Relations of 1963 in Art. 26 repeats that of Art. 45 lett. a) of the Vienna Convention on Diplomatic Relations. It states that: "(...)

[446]ICJ, Case Concerning United States Diplomatic and Consular Staff in Tehran (precautionary ordinance of 15 December 1979, in ICJ Reports, 1979, par. 28). Chinkin affirms also: "appears from this unanimous decision that no degree of crisis between the states and no threat to internal group values would support derogation from the performance of (this kind of treaties) (...)".

the receiving state must, even in the event of armed conflict, grant to members of the consular post and members of private personnel, who are not its citizens, and to members of their family living with them in domestic communion, whatever their citizenship, the time and facilities necessary to prepare their departure and leave its territory within the best possible time after the cessation of their functions. In particular, if necessary, it must provide the means of transport necessary for them and their goods, except for goods purchased on its territory and whose export is prohibited at the time of departure (...)" (Denza, 2016). This convention provides for the provision that is inherent to the outbreak of an armed conflict.

When there is a breakdown in consular relations between two states, the state of residence has an obligation according to art. 27 of the convention on consular relations: "(...) to respect and protect the consular rooms, the assets of the consular post, as well as the consular archive (...)" (Denza, 2016).

The California Court of Appeals in Brownell v. City and County of San Francisco[447], stated that: "(…) the Treaty of Friendship, Commerce and Consular Relations stipulated between the United States and Germany in 1923 should not be considered

[447]California District Court of Appeals, Brownell v. City and County of San Francisco, 1954, (Civ. Num. 15604, 21 June 1954): https://caselaw.findlaw.com/court/ca-court-of-appeal/1802773.html

abrogated following the onset of the Second World War, as the immunity from taxation for the citizens of the states in question - provided for by the treaty - did not appear to be incompatible with the existence of a state of war (...)".

Conclusion of a treaty during the outbreak of an armed conflict

We are talking about the legal effects on the ability of states, during an armed conflict, to conclude a treaty. The ILC speaking for an armed conflict is not incompatible with the possibility of a state party to enter into new international treaties. Art. 8 par. 1 of the draft articles on the effects of war on treaties states that "(…) the existence of an armed conflict does not affect the capacity of a state party to that conflict to conclude treaties in accordance with international law (...)"[448].

Thus the possibility is recognized for states that find themselves in the stage of war to conclude international treaties of a binding nature. Art. 8, par. 1 recalls and carries out the rules established by the VCLT (Channg-Tung, Garcia, 2019). In this spirit, Poland argued that the futility of the agreement underlines the ability of the state to conclude international agreements that derive from

[448]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., pp. 10ss.

the independence and subjectivity of international law[449]. Fitzmaurice states in this regard that: "(...) is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war (…)" (Fitzmaurice, 1948; Aust, 2013)[450]. In this spirit, the conclusion of an armistice with the warring parties is remembered[451]. Through an armed conflict, states have the possibility to stipulate international treaties again in a legitimate way, treaties which have as their basis the abrogation, the suspension of the same and which remain in force according to their compatibility with the state of war. Thus it is recognized that states have the possibility to conclude agreements relating to the amendment and modification of treaties. McNair in this regard states that: "(…) there is no inherent juridical impossibility (…) in the formation of treaty obligations between two opposing belligerents during the war (…)" (McNair, 1961). Par. 2 of Art. 8 of the final draft articles of ILC states that: "states may conclude agreements involving termination or suspension of a treaty or part of a treaty that is

[449]Poland, A/CN.4/622.

[450]Fitzmaurice affirms that: "(…) once concluded they are valid and binding international agreements (...)".

[451]Fitzmaurice affirms that: "(…) it also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on (…)".

operational between them during situations of armed conflict, or may agree to amend or modify the treaty (…)" (McNair, 1961).
The final draft and the projects of the special rapporteurs confirm the possibility for states that are at war to operate treaties until lawful agreements underline and regulate the validity of this type of treaties in a legitimate way. The word lawful for the ILC does not mean the legitimacy, the validity of the concluded treaties which leave the normal rules to international law including everything that is part of the VCLT.

Intention to suspend, terminate, withdraw from a treaty

Every state that is a party to a treaty that it signs has the right according to Art. 9 of the project of the ILC of 2011 to suspend, terminate, withdraw from the treaty. Principle, which is also based on Article 65 of the 1969 Vienna Convention on the law of treaties between states, also including armed conflicts which establish a general obligation to notify the relevant intentions.
When we talk about notification, art. 9 considers a receptive unilateral act where the state, after the outbreak of an armed conflict, informs the Member States of its intention to withdraw, suspend or terminate the relevant treaty[452]. The ILC highlighted

[452]Art. 9 par. 1 affirms that: "(…) a state intending to terminate or withdraw

that after the outbreak of an armed conflict a state intending to terminate, suspend or withdraw from the treaty should notify the state parties to lodge its intention. It is a position/possibility and a consequence that is established by Art. 3 of the same draft of the articles which takes into consideration the existence of an armed conflict that does not end, suspends the work of the treaty[453]. In particular, the Brownlie rapporteur stated that: "(...) bring the method of extinction, suspension or withdrawal from a treaty to the discipline provided for by articles 42, 43, 44 and 45 of ILC (...)"[454].

---

from a treaty to which it is a party, or to suspend the operation of that treaty as a consequence of an armed conflict, shall notify the other state party or states parties to the treaty, or its depositary, of such intention (...)".

[453]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 12.

[454]Art. 8 affirms that: "(…) in case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions or articles 42 to 45 of the Vienna Convention on the Law of Treaties (...)". See, ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), 2005, op. cit., pp. 38-39. Fitzmaurice had proposed his own idea about the methods and the termination or recess process. See also the: ILC, Fifty-ninth session, Fourth report on the effects of armed conflict on treaties (by I. Brownlie), 2007, A/CN.4/589, par. 34.

The rapporteur Caflisch noted that: "(...) the ILC (...) preferred instead to provide an ad hoc regulation, although modeled on what is foreseen by the Vienna Convention itself (…). This, it takes effect from the moment it is received by the other state party (or by the other state parties), unless a later date is foreseen (...)"[455]. Art. 9 par. 2 states that: "(…) the notification takes effect upon receipt by the other state party or states parties, unless it provides for a subsequent date (...)".

Par. 1 of the same art. 9, par. 2 does not refer to or say anything about the deposit of the treaty. Therefore there are treaties that are not deposited. It is not relevant whether the depositary receives notification from the state. Just because the other state party and the other states receive the notification does not mean that it is legally relevant. When the state notifies the depositary of the treaty of the will for the operation of the treaty, the notification is deemed to have effect as established by par. 2 and at the time the state party or states parties receive the depositary.

The connection between Articles 3 and 9 par. 1 of the project of 2011 is the possibility for the state to notify the other states parties of its intention to suspend, extinguish or withdraw from the treaty when a war breaks out. The states that receive the notification in question also have the right to go against what the

[455]United States (ACN.4/622).

treaty establishes within the deadline and in the absence of the rules of international law on the matter. An objection is the state's intention to extinguish, suspend or withdraw from the treaty. The ILC has oriented itself towards Art. 65, par. 3, 4 and 5 VCLT (Channg-Tung, Garcia, 2019)[456]. Par. 3 of Art. 9 of the project notes that: "(…) nothing in the preceding paragraphs shall affect the right of a party to object within a reasonable time, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal or suspension of its operation (...)"[457].

This is an objection that should have a logic over time, i.e. be presented within a reasonable period of time. The ILC has considered it appropriate to set a time that has a quantitative limit and where the state at the moment it receives the notification to object and provide the reasonable time in a way that does not make the relevant procedure as rigid and taking into account that the establishment through an armed conflict causes an increase in ongoing tensions[458]. One or more states that

[456]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 85.

[457]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

[458]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 91: "(…) at first the idea was to

are involved in war operations do not provide rigid procedures for resolving such complicated and even secondary issues in the face of an armed conflict. This temporal flexibility results in the evaluation of the objection by a state taking place within a logical deadline. This assessment takes into consideration the circumstances of the case as well as the factors of Art. 6 of the project of the ILC. Even if a state has a contrary opinion on the matter[459], the ILC takes par. 3 as fundamental and its omission creates an imbalance in the relations between the parties where the notifying state significantly expands its powers.

---

quantify a term (…) to foresee a longer period than the three-month deadline set by Article 65 par. 2 of the 1969 Vienna Convention. In the last instance, instead, the ILC preferred not to proceed with any temporal quantification, in favor of the generic reasonable time frame (…)".

[459]Greece (A/C.6/63/SR.18 par. 45): "(…) doubts about the art. 9 par. 3 of the draft articles. Furthermore, he asked for explanations to the rapporteur Caflisch about the relationship between the same par. 3 and the art. 73 of the 1969 Vienna Convention. Caflisch, in this regard, had the opportunity to specify that the art. 73 does not prejudice and does not intend to regulate the question of the legal effects of armed conflicts on the treaties; on the contrary, the draft of articles was conceived-precisely by virtue of the provisions of art. 73-in order to provide for a regulation of this matter. The ILC, as already mentioned, tried to stay as close as possible to the provisions of the 1969 Vienna Convention (…)".

If a state objects according to par. 3, the obligation, right provided for by par. 4 of art. 9 achieves a peaceful resolution through the means provided for by Art. 33 of the UN Charter (Pellet, 2014)[460]. Already par. 4 states that: "(...) an objection has been raised in accordance with paragraph 3, the states concerned shall seek a solution through the means indicated in Article 33 of the UN Charter (...)". Art. 9, par. 1 of the project of 2011 notifies the states parties of the intention to extinguish, suspend, withdraw a treaty and the notified states object to the will which remains open until the states resolve the relevant dispute and as provided by Articles 33VCLT (Channg-Tung, Garcia, 2019) and 9, par. 3 of the ILC project of 2011[461].

[460]Art. 33 of the Charter of the UN affirms that: "(…) 1.The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by a negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice; 2.The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means (…)".

[461]ILC, Sixty-second session, Report on the work, 2010, par. 207, A/65/10, op. cit., par. 245: "(…) they wanted to follow the idea that in the event of an objection by the notified state, the question thus opened between the latter and the notifying state should remain suspended until the end of the armed conflict. Subsequently, instead, it was decided to provide for these states the obligation to attempt a peaceful settlement of disputes, given that the

Art. 9 does not limit the rights, powers to limit, or influence the obligations of states relating to the peaceful resolution of international disputes. The ILC through a safeguard clause stated that: "(...) nothing in the preceding paragraphs shall affect the rights or obligations of states with regard to the settlement of disputes insofar as they have remained applicable (...)"[462].

So we can refuse to interpret Art. 9, par. 4 as the possibility of a clean slate of principles and obligations at the moment that are obliged to resolve the relevant issue[463]. The ILC have prevented the procedure of peaceful solution from being accessible to an armed conflict and the treaties that are signed at that particular moment are considered to have been implemented even at the moment the war begins and continues over time[464].

In finis, we can say that art. 9 includes a process that allows a state to extinguish, suspend, withdraw a treaty as is supported by

---

operation of the art. 33 of the Charter of the United Nations does not fail in the event of armed conflict (…)".

[462]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

[463]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 13.

[464]See the position of Hungary (A/C.6/63/SR.17, par. 33) and Malaysia (A/C.6/63/SR17, par. 10). ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 87.

some states[465] and the ILC itself follows this procedure in a practical way especially when the other state and/or the state parties and the depositary are found to be parties to the armed conflict. The notification obligation is foreseen in the article as well as the rules of the project of the 2011 and as necessary to make the project at a theoretical level and in practice not followable.

Fulfillment of obligations arising from international law

When we talk about the fulfillment of obligations that are foreseen and that come from international law, we immediately remember Art. 10 of the project of 2011 which concerns obligations that are independent of what is established by the treaty, from extinction, suspension and/or recession. The principle of the same is accepted by the states and is carried out with no comments in question[466].

If a state/states which is/are the recipients of the notification of Art. 9 of the project of 2011 and who object within a certain period of time the opposition to a peaceful settlement of

[465]Greece (A/C.6/63/SR.18 par. 45) and the United Kingdom (A/C.6/63/SR.16 par. 59).

[466]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), op. cit., par. 97.

disputes, termination, suspension and withdrawal from a treaty do not in any way render the relevant treaty to be operational as well as the obligation for the state to notify the relevant fulfillment of the relevant obligations that are provided for by the treaty as well as the bases of the international law. The treaty may otherwise be irrelevant. This is actually a principle that is part of the customary law of international law. The ICJ stated in this regard that: "(…) the fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions (...)"[467].

Art. 10 of the project of 2011 affirmed: "(...) the termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any state to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty (...)"[468].

Articles 10, 11 and 12 of the final draft present an example that aligns the project with how it is foreseen by the VCLT and how

[467]ICJ, Military and Paramilitary Activities in and against Nicaragua, op. cit., p. 392.

[468]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 13.

it is provided for by Articles 43, 44 and 45 of the same VCLT (Channg-Tung, Garcia, 2019; Hollis, 2020).
Art. 10 is based on Art. 43 of VCLT entitled: "Obligations imposed by international law regardless of treaties" and states that "(…) the nullity, extinction or denunciation of a treaty, the withdrawal of one of the parties or the suspension of the application of the treaty, when they are due to the application of this Convention or the provisions of the treaty, they shall in no way prejudice the duty of a state to fulfill any obligation set out in the treaty, to which it is subject under international law independently of the treaty itself (...)" (Hollis, 2020).

Provisions of the treaty and severability thereof

Separating the provisions of a treaty and what is pre-established according to the VCLT opens up the possibility of evoking the relevant principle of evaluating the effects of wars on treaties not on its entirety but in part of it[469].

[469]"(…) the separability of treaty provisions was until comparatively recently considered almost exclusively in connection with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities, however, have advocated recognition of the principle of separability (…) in determining the effect of war upon treaties. They have urged that in some cases one provision (...)".

In particular, McIntyre noted that: "(…) the practice of the United States accepts the separability of the articles of a treaty unless they form part of an indissoluble whole which depends for its validity upon the continued operation of each of its components. This principle is now widely accepted by text writers as well as practitioners, and differs sharply from the view earlier held by writers such as Vattel (…)" (Mcintryre, 2012).
Art. 11 of the draft articles regulates the relevant provisions of the treaty as an effect of an armed conflict and which fundamentally represents the draft of the relevant articles[470]. The same article works to modify not the armed conflict but the treaty itself. Thus, art. 11 allows each armed conflict to have different effects for a treaty of each kind[471]. Also in this case it is provided that Art. 44 VCLT (Channg-Tung, Garcia, 2019) was the basis for Art. 11 of the ILC project[472].

[470]Yearbook of the ILC, 1966, pp. 169: "(…) the exception of the Nordic States, the standard has found general approval. The latter, however, would have preferred more discussion about the structure of the article in question. For further details see: A/C.6/63/SR.16 par. 32. treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty (…)".
[471]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 14.
[472]See Art. 44 VCLT.

An article that provided in a general way for the withdrawal, suspension, operation of the treaty as a consequence of an armed conflict where the absence indicates to a treaty that the agreement between the parties involves the entire treaty. Thus the spirit is established, i.e. the principle of separability of having a presumptive basis.

The article itself already has some exceptions such as the derogation of the general principle where armed conflict produces legal effects on the entire treaty.

The effects of the armed conflict have no consequences for the entire treaty when: "(...) a) the treaty itself contains clauses that are separable from the rest of the treaty; (b) it appears from the treaty, or is otherwise established, that the acceptance of such clauses was not an essential element forming the consent of the other party to be bound by the entire treaty; of this Convention, may be invoked only in relation to the treaty as a whole, except in the cases provided for in the following paragraphs or in Article 60; 3) if the reason in question refers only to some particular clauses, it cannot be invoked in relation to those clauses alone when: a) such clauses can be separated from the rest of the treaty as regards their execution; b) it appears from the treaty or is otherwise established that the acceptance of the aforementioned clauses constituted for the other party or parties

to the treaty the essential basis of their consent to be bound by the treaty as a whole; and c) it is not unfair to continue to implement what remains of the treaty (...) and as confirmed by Art. 11 which states: "(…) termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty (...) c) the continued operation of the rest of the treaty would not be unfair (...)"[473].

In particular, letters a) and c) repeat what is pre-established through Art. 44 VCLT (Channg-Tung, Garcia, 2019). Especially, letter c) represents that the word unjust has been brought and established by many states and above all by the United States which already state in this regard that: "(…) it is possible that a state claiming invalidity of part of a treaty might insist on

[473]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 14: "(…) art. 11 states that the legal effects of armed conflicts concern the treaty in its entirety: "except where: a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application; b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole and c) continued performance of the remainder of the treaty would not be unjust (…)".

termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties (…)". A state could insist on the termination or invalidity of a treaty by providing an excessively restrictive interpretation of the word "separable" contained in par. 3 of Art. 44 VCLT. This state sought to provide greater protection to the other parties to the treaty by placing a further limit on the severability of the contractual provisions[474]. This represents a general clause that can be invoked in the event that the separation of the contractual provisions could create an imbalance to the detriment of the other parties (Hollis, 2020).

As regards the cases of letters a), b) and c), the armed conflict produces effects on the treaty that only one party and its own clauses condition in a separable way. This principle also arises from the jurisprudence in the Techt v. Huges case of 1920, where judge Cardozo stated that: "(…) the traits in the tombs are whole than the character of an indivisible act" (McNair, 1961).

[474]ILC, Sixty-second session, First report on the effects of armed conflicts on treaties (by L. Caflisch), 2010, op. cit., parr. 100 and 101.

Losing the right of extinction, recession, suspension of the operation of a treaty

Contrary to what we noted and talked about before, i.e. for the article relating to the notification when one wants to terminate, suspend or withdraw from a treaty, according to the ILC there is the possibility of having lost this discretion, a state's right and of being subject to certain limits.

Art. 12 of the draft articles of the ILC goes beyond the scope of the limits that states must terminate, withdraw from, suspend the operation of a treaty in the event of an ongoing armed conflict. It provides that a state cannot proceed with this type of activity due to knowledge of the facts and as long as the treaty remains in force despite the fact that the conflict does not continue and that the state behaves silently. This is a behavior of acquiescence that the treaty continues to remain in force (Liakopoulos, 2022). Thus, the state is required to know not only the existence of an armed conflict but also the related consequences and possible effects that the conflict creates with respect to the treaty[475].

Art. 12 affirms that: "(…) a state may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the

[475]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 15. Colombia was the only state that explicitly supported this provision: see also: A/CN.4/622.

facts: a) it shall have expressly agreed that the treaty remains in force or continues in operation; or b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force (...)"[476].

This is an article based on the spirit of Art. 45VCLT (Channg-Tung, Garcia, 2019; Hollis, 2020)[477], introducing effects on armed conflicts and on the treaties of operation of the principle of good faith. A principle that prevails from the situation of an ongoing armed conflict. Art. 12 provided for the limits of the notification of intention and how it is governed by the behavior that a state relates to the relevant treaty during an armed conflict. Thus, it is considered that active behavior manifests the desire for the permanence of a treaty which has a passive nature and the state behaves according to a spirit that lends its will to continuing the work and vigor of the treaty. Behaviors such as silence and will are contrary and the state thus loses the relevant right. In this spirit, China has stated that "(...) the course of an armed conflict can be foreseen as to what effects it may cause on the treaties. Precisely by virtue of this uncertainty, typical of armed conflicts, this country has supported the possibility for a state to reconsider the position previously taken during the

[476]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

[477]See Art. 45 VCLT.

armed conflict (...)[478].

The resumption of relations between states

During the outbreak of an armed crisis a state loses its communication status, rectius has no relations with other states. Once a treaty has been terminated or suspended, the states parties are free to conclude another international agreement which restores that same treaty.

Art. 13 of the 2011 draft of the ILC states in par. 1 that:"(…) subsequent to an armed conflict, the states parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict (...)"[479].

Thus an agreement was reached which has a new character and which seeks to regulate the treaty which was terminated, suspended, thus allowing the states to conclude international agreements even during the war. The ILC itself states that: "(…) specific agreements regulating the revival of such treaties are not

[478]China (A/C.6/63/SR.17 par. 56).

[479]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

prejudiced by the present provision (…)"[480]. We remember the Peace Treaty concluded between Italy and the Allied Powers on 10 February 1947, where art. 44 stated: "(...) the possibility for each Allied Power to notify Italy - within a maximum period of six months - which bilateral treaties concluded with Italy before the war it intended to maintain or reintroduce (...)".

Art. 13 in the second paragraph pre-establishes in a limited way what it has declared in the first paragraph. It certainly appears to have a more limited scope respecting the application of the treaties and its own actions despite the application of art. 6 of the same project. In particular, par. 2 notes that: "the resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indices referred to in article 6 (...)".

These types of treaties determine what has been expressed in art. 6 taking into account the nature of the treaty, the subject matter that regulates it, its content, the number of parties, as well as the characteristics of the armed conflict, its territorial extension and its intensity.

Considering that par. 1 in a different way and with regard to the operation of the suspended treaty determines the initiative of a

[480]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 16, par. 2.

state that takes over the stipulation of an ad hoc international agreement. It also remains the problem of operations which should be resolved with assessments that need to be checked on a case-by-case basis[481]. Leaving aside, that a treaty should be bilateral or multilateral[482], we focused on the fact that it is operational in the shortest possible time even after the cessation of the use of force (Delbrück, 2000; Nuňez-Mietz, 2020)[483].

What are the effects for the right of legitimate defense on treaties and its exercise?

Speaking of self-defense we mean what is pre-established through Art. 51 of the UN Charter (Pellet, 2014) and what corresponds to the customary norm for every state that is attacked, as well as to Articles 2 and 4 of the UN Statute, that are noted in armed conflict, the use of force, the use of weapons,

[481]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 16, par. 4.

[482]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., p. 86, par. 159: "(…) modern practice regarding the length of treaty suspension no longer focuses on the distinction between bilateral and multilateral treaties (...)".

[483]Delbrück affirms that: "(…) suspension will be considered to end, and treaty obligations to (...)".

war equipment, etc.

In particular, Article 14 of the draft of 2011 states that: "(…) a state exercising its inherent right of individual or collective self defense in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right (...)"[484]. This provision does not guarantee immunity to the aggressor state and does not avoid being party to a treaty that prevents a state from fundamentally exercising the right to express its sovereignty such as that of self-defense[485]. Balancing the interests that are opposed leads to greater protection of the law and the principle of the pacta sunt servanda.

Art. 14 takes into consideration the suspension of a treaty but not the extinction between the attacked state and the aggressor state

[484]Article. 7 of the Helsinki resolution of 1985, on which the current art. 14 of the final draft of articles, affirms that: "(…) a state exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequence resulting from a later determination by the Security Council of that state as an aggressor (...)".

[485]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., pp. 16-17, par. 2.

thus excluding the operation of a treaty which is incompatible with the exercise of the right of legitimate defense and which is suspended an agreement where the attacked state is a third state. The suspension of the operation as a consequence of the exercise of the right to self-defense does not have to do with the applicability of the rules of international law which is part of issues such as notification, opposition and peaceful resolution of disputes[486].

The provisions of some treaties, especially in the field of human rights, do not suspend the invocation of the right of self-defense, as for example we also see in the case of international humanitarian law and/or those that establish borders[487].

On the subject, the speaker Brownlie stated the "(...) right of self-defense in favor of a general reference to the general principles of international law and the provisions of the United Nations Charter". Art. 10 of the first draft of articles, entitled: "Legality of the conduct of the parties" affirms that: "the incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according to either to the principles of general

[486]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 17, par. 4.

[487]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 17, par. 2.

international law or the provisions of the Charter of the United Nations (...)"[488]. This formulation did not receive consensus from the states who were inclined to provide for the direct reference to self-defense, including individual and/or collective, and to the general principles of international law by the UN[489]. This is a position that has not been accepted by art. 10 and left the possibility of the difference in the effects that are legal to conventional relations between an aggressor state that reacts in a

[488]ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), op. cit., p. 40.

[489]ILC, Sixty-second session, Report on the work, 2010, op. cit., par. 273: "(…) the states that have sent to the Critical Commissions and negative opinions regarding the old formulation of the former art. 10 are: Algeria (A/C.6/60/SR.20, par. 64); China (A/C.6/60/SR.18, par. 10); France (A/C.6/60/SR.11, par. 75); Japan (A/C.6/60/SR.20, par. 22); Greece (A/C.6/60/SR.19, par. 37); Malaysia (A/C.6/61/SR.19, par. 55); Morocco (A/C.6/60/SR.11, par. 42); Islamic Republic of Iran (A/C.6/60/SR.18, parr. 6 and 7) "(…) was considered necessary both by doctrine and by practice. To tell the truth, it was also thought to recall the art. 8 bis of the Rome Statute of the International Criminal Court. This last idea, however, was soon abandoned because the provisions concerning the aggression provided for by this Statute-concerning this the criminal responsibility of individuals-were irrelevant with regard to the effects of armed conflicts on the treaties (…)".

state of self-defense[490]. Thus the safeguard clause is replaced and directly refers to legitimate defense according to Art. 51 of the UN Statute, thus, representing the safeguard clause which does not provide for the conditions that react in legitimate defense such as necessity, immediacy and proportionality[491].

Having an aggressor state benefit from conduct that goes against international law

From the above paragraphs we understood that the ILC was concerned with various topics that have to do with armed conflicts. In particular, the ILC tried to protect the reaction to self-defense during an armed attack. The ILC was also against, we might say, allowing an aggressor state to gain benefits in favor of states exercising self-defense.

In this sector, the ILC has taken into consideration Art. 9 of the Resolution of the Institute of International Law of 1985[492] as well

[490]ILC, Fifty-ninth session, Third report on the effects of armed conflict on treaties (by I. Brownlie), op. cit., pp. 18, par. 59: "(…) art. 14 has tried to remain as faithful as possible to art. 51 Charter of the UN, also as regards the title of the same (…)".

[491]ILC, Sixty-second session, Report on the work, 2010, p. 307, par. 267.

[492]Art. 9 of the resolution of the Institute of International Law of 1985 states that: "(…) a state committing aggression within the meaning of the Charter

as Art. 15 of the definitive project entitled: "Prohibition of benefit to an aggressor state" stating that: "(…) a state committing aggression within the meaning of the UN Charter and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that state (...)"[493].

It is difficult, however, to determine the existence of an act of aggression as a fact that the international community has not reached in a precise and unambiguous way by sharing the definition of aggression according to Resolution 3314/1974 which in this case remains controversial[494]. The aggressor state, thus, tries to attribute the relevant responsibility during the outbreak of an armed conflict and which remains suspended after the intervention of the United Nations Security Council (Higgins, Webb, Akande, Sivakumaran, Sloan, 2018)[495]. As a consequence, the notion of an aggressor against a state is

---

of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that state (...)".

[493]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

[494]ILC, Sixty-second session, Report on the work, 2010, op. cit., par. 273.

recognized and the related notification which extinguishes, withdraws, suspends the operation of a treaty, carrying out what is ineffective according to Art. 15 of the project of 2011.

(Follows) The decisions of the UN Security Council

The reference to the UN Security Council of the relevant decisions according to Chapter VII of the Charter (Schrijver, 1994; Farral, 2009; Schwartzberg, 2016) as well as the related conventional obligations of the member states was a topic of discussion and not only for the ILC.

In particular we remember Art. 16 of the project of 2011 which had the objective of taking into consideration the legal effects of the decisions of the Security Council and which respected the effects of armed conflicts on the treaties, thus taking into account the matter of collective security and how it is adopted according to Art. VII of the Charter.

Art. 16 actually includes Art. 8 of the resolution of the Institute of International Law of 1985[496] which states that: "(...) draft

[495]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 18, par. 3.

[496]Art. 8 of the resolution of the Institute of international law affirms that: "(…) a state complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace,

articles are without prejudice to the relevant decisions taken by the Security Council in accordance with the Charter of the United Nations (...)". Thus it is stated that the articles on the legal effects in armed conflicts on the treaties do not call into question and do not prejudice the decision-making work of the UN Security Council[497]. Within this context it is noted that: "(…) other international agreements such as trade agreements and postal conventions will be violated by the action required to give effect to the Council's decision (…). The situation is squarely faced by the Charter (…)" (Goodrich, Hambro, 1949; Gill, Fleck, 2010; Daniel, Hayes, 2016). Art. 103 of the same Charter took into consideration the obligations for states that derive from decisions according to the UN Charter and obligations that derive from the adhesion of international conventions and which prevail over the former (Liivoja, 2008; Bernhardt, 2012). The

breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty witch would be incompatible with such resolution (...)".

[497]"(…) 1969 Vienna Convention on the law of treaties between states, in its art. 30 par. 1, affirms the supremacy of art. 103 Charter of the United Nations. Article. 30 par. 1, in fact, states that subject to the provisions of art. 103 of the Charter of the United Nations, the rights and obligations of the States parties to successive treaties concerning the same matter, are defined in accordance with the following paragraphs (…)".

obligations that come from the UN are also accepted in practice[498].

A state that behaves in a similar way after a decision of the Security Council thus represents a justification for any breaches of a conventional nature that derive from a treaty and are due to conduct (Jessup, 1948)[499]. This state according to Art. 25 of the UN Charter is obliged to accept and execute the relevant decisions that are adopted by the Security Council and on the basis of the same charter (Layton, 1962-1963; Zemanek, 1977; Dupuy, 2002; Jacovides, 2011)[500].

---

[498]ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of the International Law, 2006, A/CN.4/L.682, parr. 328-340.

[499]Jessup, affirms that: "(…) action taken by a Member [of the United Nations] in compliance with [a decision of the Security Council] would constitute justification for any incidental breach of a treaty obligation calling for freedom of commercial intercourse or of communications (...)".

[500]"(…) Art. 103 of the UN Charter does not lead to an automatic repeal of conventional obligations that conflict with the practical implementation of the Security Council's decision; Article. 103, in fact, establishes simply that the obligations deriving from the Charter of the United Nations must prevail over the others (…)". ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of the International Law, 2006, op. cit. par. 332. ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit.,

The obligations of a conventional nature between the states are thus: "(...) inconsistent with enforcement measures taken pursuant to a Security Council decision need not be observed by cooperating member states (Layton, 1962-1963) (…). The member state must respect and execute (first and foremost) the Security Council's decision and, despite this, respect the other commitments conventionally undertaken, compatibly with the obligations due to adherence to the United Nations Charter (...)" (Jacovides, 2011).

Effects of armed conflicts on treaties. The principle of neutrality

Speaking about the effects that armed conflicts have on treaties, we take into consideration Articles 16 and 18 of the draft articles as well as art. 17 which concerns the safeguard clause.

In particular, Art. 17 of the project of 2011 concerns the legal effects of armed conflicts on treaties and does not judge the rights and related obligations of states that derive from the right of neutrality[501]. Rights that continue to be constrained and that

p. 79, par. 144.

[501]ILC, Fifty-ninth session, Third report on the effects of armed conflict on treaties (by I. Brownlie), cit., p. 19, par. 65: "(…) Art. 17 affirms that: "(…)

respect the situation that was created after the outbreak of hostilities. If it were otherwise, the rights derived from the draft articles on the effects of armed conflicts on the treaties allows the ILC to take into consideration that the effects of armed conflicts and the principle of neutrality travel in parallel tracks.

The principle of neutrality as a law respects the effects of armed conflicts and as stated by a research coming from the Harvard University which states: "(...) in the case of multiparty treaties to which neutral states (…) are parties, the outbreak of war between some of the parties does not ipso facto or otherwise terminate or even suspend the operation of such treaties as between the belligerent and neutral parties, nor, of course, as between the neutral parties themselves (...)". The resolution of the Institute of International Law of 1985 also stated in this regard that: "(…) does not prejudge rights and duties arising from neutrality (…)" (Harvard Research in International Law, 1935). In the same spirit, the ICJ also highlighted the importance of neutrality which respects the effects of armed conflicts on treaties, establishing that the principles of humanitarian law are applicable through an armed conflict and the principle of

---

the present draft articles are without prejudice to the rights and duties of states arising from the laws of neutrality (…) this provision was not deemed necessary with respect to the question of the effects of armed conflicts on the treaties, it received support in general (…)".

neutrality makes all international armed conflicts applicable[502].
It is thus a relationship (Schwarzenberger, 1967)[503] which comes from the fact that an armed conflict, the presence of neutral states lead to a suspension of multilateral treaties through a conflict where the action of the cessation of the relative hostilities is automatically postponed. Neutrality thus becomes operational when an armed conflict breaks out and respects the same work. The use of the escape clause is part of the use of an ad hoc terminology that refers to the status of third state as neutrals thus abandoning it in an imprecise manner. It is not

[502]ICJ, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, op. cit., par. 89: "(…) as in the case of the principles of of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (...) to all international armed conflict (...)". ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., p. 76, par. 138.

[503]Schwarzenberger affirms that: "(…) in the case of treaties between states which, subsequently, change into belligerent and neutral powers, the typical intention of parties is that such treaties, especially those in the field of international economic law, should continue to apply, but subject to any overriding interests which arise from the position of the contracting parties as belligerent or neutral states (…)".

obvious whether neutrality and non-belligerence[504], are referred to, thus avoiding the problems of interpretation that a generic provision provides.

Adding other cases of withdrawal, extinction and suspension of treaties

The draft of 2011 of the ILC and articles 16 and 17 have allowed the safeguard clause which guarantees rules of operation of the other causes of suspension, extinction which are provided for in international law[505]. The outbreak of an armed conflict makes the lex specialis and the operation of other rules of international law applicable in the same matter[506].

Art. 18 of the project of 2011 also provides that the project did not take into consideration the possibility of extinction, withdrawal or suspension of the operation of a treaty following

[504]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 19, par. 1.

[505]ILC, Fifty-seventh session, First report on the effects of armed conflict on treaties (by I. Brownlie), 2005, cit., p. 42, par. 126. ILC, Fifty-ninth session, Third report on the effects of armed conflict on treaties (by I. Brownlie), 2007, op. cit., p. 20, par. 66.

[506]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 19, par. 2.

the material non-compliance, the supervening impossibility, the fundamental change in circumstances[507]. This is a list that is considered open and certainly not exhaustive.

Art. 18 actually took into consideration the withdrawal, the suspension of the application of other rules that preserved the extinction, withdrawal, suspension of the application of various rules of international law according to Articles 55-62 VCLT (Channg-Tung, Garcia, 2019)[508].

This is a provision which highlights that the armed conflict produces effects on treaties which are stipulated and which integrate the causes of extinction of the Vienna Convention of

[507]ILC, Sixty-second session, Report on the work, 2010, op. cit., p. 311, par. 282: "(…) art. 18 affirms that: "(…) the present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, inter alia: a) a material breach; b) supervening impossibility of performance; or c) a fundamental change of circumstances". To tell the truth, the initial idea was to make a reference to the general rules of international law, rather than providing a non-exhaustive list of hypotheses (in particular those provided for in articles 55-62 of the Vienna Convention) suitable for causing the extinction, withdrawal or suspension of the operation of the treaty (…) preferred to provide a short, non-exhaustive list, in order to make the arrangement as clear as possible and to eliminate any interpretative problems (…)".

[508]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, op. cit., p. 19, par. 1.

1969 and which does not include the provisions of the same convention in itself. Thus, effects on the treaties are achieved through the rules that are dictated by the VCLT and cannot integrate the specificity of the conflict which is evaluated in a concrete way independently of them. This is an evaluation that is carried out in each case which checks the declarations of the parties as well as the related rulings of the arbitrators.

The progress of the project of articles under investigation

The ILC's work continues to this day despite facing challenges with various national legal systems. The time is ripe but we still do not have a text of a customary nature regarding armed conflicts given that the political weight of many states does not allow a codification to be concluded immediately and with strong effects for all participating states. The delicacy of the matter, the continuous crises, the outbreaks that do not close and make use of new strategies with the help of new technologies still pose a difficulty to the work of the ILC in order not to arrive soon at a jus cogens convention (Dudley, 2016)[509]. The main

[509]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, A/C.6/69/SR.18, par. 46. "(…) did not support the elaboration of a convention on the topic (...)".

work is to bind all participating states to a complete, precise conventional text.

On the other hand, there have already been voices from the past from states that do not want the binding nature such as the United States[510], Russia[511], the countries of the African Group

[510]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 22. "(...) work towards the elaboration of a convention on the effects of armed conflicts on treaties (...)".

[511]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 13. "(…) The draft articles under consideration could not be regarded as reproducing norms of international customary law on the effects of armed conflicts on treaties (…) they could be useful as a guide for states and might enable future practice to develop in a more precise framework (...)".

(represented by South Africa)[512], India[513], Israel[514], Singapore[515], Cuba[516], Argentina[517] and Malaysia[518]. Instead, on the other hand, there is also another group of states that want an international convention on the matter of a binding nature and with a customary character, such as the Nordic countries[519], Portugal[520]

[512]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 9. "(…) The African Group did not support their elaboration in the form of a binding legal instrument. The draft articles sought to clarify an area of law in which there were not many rules (...)".

[513]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 9. "(…) The African Group did not support their elaboration in the form of a binding legal instrument. The draft articles sought to clarify an area of law in which there were not many rules (...)".

[514]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 38. "(…) The draft articles should be considered for adoption as guidelines for states in determining the fate of treaties in a situation of armed conflict (...)".

[515]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 32. "(…) Further work was needed on the substance and application of the draft articles before the question of their final form could be examined (...)".

[516]General Assembly of the United Nations, Sixth Committee, Summary

and Greece[521].

Most criticism was based on Art. 7 of the project of 2011 given the perplexity that is interpreted and the criteria where the list was drawn up and the provisions that are part of its content[522]. It was also noted that there is no precise notion that is accepted by all states regarding armed conflict. Especially the United States

record of the 18th meeting, 2014, op. cit., par. 27. "(…) The draft articles should not take the final form of a convention (...)".

[517]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 43. "(…) Delegation hoped that discussion on the draft articles would continue (...)".

[518]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 40. "(…) Malaysia could, however, agree if the draft articles were to serve as non-binding guidelines (...)".

[519]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 11.

[520]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 34. "(…) Portugal agreed (...) on the whole and considered (...) to be suitable for an international convention (...)".

[521]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 39. "(…) it should also consider (...) the elaboration of a convention (...)".

which only wanted to repeat the notion and to adopt a final article based on Articles 2 and 3 common to the Geneva Conventions[523]. The states were convinced that the current development of international law recognizes the use of the draft articles and they consider the relevant provisions of the same draft to be considered according to norms of a customary nature.

Elements of codification, integration and evaluation for a codification attempt on the subject

A codification of customary matters is very difficult and perplexing given the attitudes not only of the participating states but also the practice and the continuous outbreaks that frighten the participants. The homogeneous nature, the comparison between various legal systems and practice, common law countries, a lack of continuous practice over time, European legal systems not all homogeneous, political intentions do not lay the foundations for a clear and declarative customary law

[522]In this sense, different states have expressed themselves, but especially Russia, the Nordic countries, India, Israel and Singapore.

[523]General Assembly of the United Nations, Sixth Committee, Summary record of the 18th meeting, 2014, op. cit., par. 45.

towards an elaboration of a binding agreement.

The customary nature of the rules allows the ILC to continue the attempts of a massive work of the principles that are also established and codified by the VCLT, as well as, the war on the treaties. The old ideology of the main effect of a war extinguishing pre-war conventional instruments is not so outdated. Extinguishing conventional law represents a norm of customary rank which subsequently falls into disuse. But is it so? This is not so much because regulating, understanding, evaluating this perspective is complex through jurisprudential work that every conflict does not come to itself but to a total evaluation as a conflict that should have all the characteristics of the past and that every war is the same with another. But it is not so! The birth of alternatives that are contrary to ancient rules refer to the criterion of compatibility where the interpreter activates and considers the effects of an armed conflict on the treaties without applying a rule written first but puts the criteria, the elements that must be considered suitable for the operation of the treaty that is compatible with the situation creating the outbreak of an armed crisis.

Already, Art. 6 of the project of 2011[524], provides elements and

[524]ILC, Draft Articles on the Effects of Armed conflicts on treaties with commentaries, 2011, A/66/10 and Add. 1.

criteria for the evaluation of armed conflicts but not in a satisfactory way. The project of 2011 does not have a customary character. It certainly represents a development for international law (Mcrae, 2012) despite the fact that it repeats the rules of the VCLT in a less than “intelligent” and “original” way. The innovative nature is difficult in this matter and perhaps this was the logic of the past as innovation, needing, however, time to be welcomed and accepted by the international community. The evaluation mechanism for each crisis in itself, as well as with pre-war effects and after the outbreak of the crisis is a way out that the work of the ILC must concentrate on a new project on the subject examining separately the operations, the practice and interpretation of the fate of conventional law in the coming years in the field of armed conflicts.

Evaluate the work done to move forward into the future

Concluding our investigation paper we must first of all understand and respect the continuous effort of the ILC in the past and future years in the field of armed conflicts.

The General Assembly has been very cautious on the matter so far and has not forced the ILC towards a new project and codification for the foreseeable future. It also adds to the

perplexities that are noted by international and national courts, thus contributing to a non-homogeneous development in the matter which continues to prove contradictory. To date, internal armed conflicts produce legal effects not only in practice but also in theory on bilateral or multilateral treaties[525]. The area of armed conflict effects on treaties regulates the rules on the law of treaties. The preparatory works are based on the old recipe of the VCLT given the expectation that states were reluctant in the question of the scope of application in the same matter. Already Art. 73 VCLT (Channg-Tung, Garcia, 2019) ended in the sixties where the causes of the production of a conventional right were different from those of today and were included and exhausted in it (Hollis, 2020). The treaties are the mirror of an everyday reality, that conflicts continue and which are different from the past where circumstances have changed and the impossibility that has arisen also affects the form and content of the treaties in an autonomous and not way. The law of the treaties of armed conflicts is found in analogy with the rebus sic stantibus clause and the causes of extinction and suspension whenever the discipline contained in the VCLT is not now exhausted, but is presented as incomplete, without covering all the options of

[525]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., p. 87, par. 162.

armed conflicts including the principle of separability and its operation as a cause of extinction, suspension and as causes provided for by international law which must be taken into consideration as clauses incompatible with armed conflict. Each armed conflict produces different effects with each treaty. Thus the provisions are repealed without having effect on provisions that are not incompatible with the effects of armed conflicts and on conventional provisions[526].

The principle of separability is effective in considering the treaty as a regulation of interests and not as a source of right to a content which presents itself as a container of the entire presentable situation. If it is considered as a source the only solution is the extinction, the suspension of the conventional instrument which welcomes the treaty as a regulation of a principle which allows rules of the treaty which are not so incompatible with a conflict and continue to be in force even before, during and after the outbreak of an armed conflict. This mechanism, now common practice, does not prevent the principle of separability from providing, obtaining results relating to the extinction, suspension of a regulatory framework of a treaty given that the provisions are incompatible with the

[526]ILC, Fifty-seventh session, The effect of armed conflict on treaties: an examination of practice and doctrine, 2005, op. cit., p. 87, par. 162.

conflict which perhaps comes into conflict with another treaty and not on the same matter.

The final objective should be a convention in which a massive group of states participated, establishing if not the path of an agreement in the matter giving greater certainty and evolution on international law. The convention contains rules that cannot be considered of a customary nature but pass over time and become the basis for the near future, regulating the effects of conflicts in a precise and stable manner on a case-by-case basis on the treaties. A position that is certainly much more beneficial if not in favor of armed conflicts but at least towards greater stability of the international order. Armed conflict scenarios will always be open and under discussion. Thus a transformation towards a convention of a draft of articles developed by the ILC is achieved at an international level. This is the basis of closing the gaps, especially the political ones as well as the uncertainties in the field of armed conflicts in the near future.

References

Afriansyah, A. (2011). State responsibility for environmental protection during international armed conflict. *Indonesian Journal of International Law,* 8 (3), 474ss.

Aledo, L.A. (2021). *Le droit international public.* ed. Dalloz, Paris.

American Law Institute (1987). *Third Restatement of the Law. Foreign Relation Law of the United States.* American Law Institute, par. 336.

Arajärvi, N. (2017). The requisite rigour in the identification of customary international law: A look at the reports of the Special Rapporteur of the International Law Commission. *International Community Law Review*, *19*(1), 12ss.

Aust, A. (2013). *Modern treaty law and practice.* Cambridge University Press, Cambridge, 235ss.

Baarde, B., Mührel, L., Petrov, A.O. (2018). *International humanitarian law in areas of limited state hood: Adaptable and legitimate or rigid and unreasonable?.* ed. Nomos Verlag, Baden-Baden, 224ss.

Bernhardt, R. (2012). Art. 103. In Simma, B. (ed.). *The Charter of the United Nations: A Commentary.* Oxford University Press, New York-Oxford, 1294ss.

Bowman, M.J., Kritisiotis, D. (2018). *Conceptual and contextual perspectives on the modern law of treaties*. Cambridge University Press, Cambridge, 780ss.

Briggs, H.W. (1953). *The law of Nations.* Stevens and Sons, London, 938ss.

Channg-Tung, L., Garcia, T. (2019). *La Convention de Vienne sur le droit des traitès. Bilan et perspectives 50 ans après son adoption.* ed. Pedone, Paris.

Chinkin, C.C. (1981-1982). Crisis and the performance of international agreements: The outbreak of war in perspective. Y*ale Journal of Public Order, 7,* 178ss.

Dam-de Jong, D., Sjöstedt, B. (2021). Enhancing environmental protection in relation to armed conflict: An assessment of the ILC Draft Principles. *Loyola Los Angeles International & Comparative Law Review, 44,* 132ss.

Daniel, D.C.F., Hayes, B.C. (2016). *Beyond traditional peacekeeping*. ed. Springer, Berlin, 18ss.

David, R., Macdonald, S. (1955). International law. The abrogation of treaties by war. *Michigan Law Review, 53*, 759ss.

Delbrück, J. (2000). War, effect on treaties. In R. Bernhardt, *Encyclopedia of public international law.* North-Holland publication, Amsterdam, New York, 1373ss.

Denza, E. (2008). *Diplomatic law. A commentary on the Vienna Convention on Diplomatic Relations.* Oxford University Press, Oxford, 191ss.
Denza, E. (2016). *Diplomatic law: A commentary on the Vienna Convention on Diplomatic Relations.* Oxford University Press, Oxford.
Distefano, G. (2019). *Fundamentals of public international law: A sketch of the international legal order.* ed. Brill, The Hague, 622ss.
Dörr, O. (2018). Article 31. General rule of interpretation. In O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A commentary.* Springer, Heidelberg-New York, 536ss.
Drahozal, C.R., Gibson, C.S. (2007). *The Iran-US claims tribunal at 25*. Oxford University Press, Oxford.
Dudley, L. (2016). Until we achieve universal peace: Implications of the International Law Commission's Draft Articles on the "effects of armed conflict on treaties. *American University National Security Law Brief, 6 (1),* 34ss.
Dupuy, P.M. (2002). *L'unité de l'ordre juridique international. Cours général de droit international public.* Recueil des Cours de l'Académie de Droit International. ed. Brill, Bruxelles, vol. 358, 242ss.

Dupuy, P.M., Kerbrat, Y. (2020). *Droit international public.* ed. Dalloz, Paris.
Falk, R. (1980). The Iran hostage crisis: Easy answers and hard questions. *American Journal of International Law, 74 (2),* 412ss.
Farral, J.M. (2009). *United Nations sanctions and the rule of law*. Cambridge University Press, Cambridge, 8ss.
Fitzmaurice, G.G. (1948). *The juridical clauses of the peace treaties*. Recueil des Cours de l'Académie de Droit International. ed. Brill, Bruxelles, vol. 73, 302ss.
Gardam, J. (2001). The contribution of the International Court of Justice to international humanitarian law. *Leiden Journal of International Law,* 14, 352ss.
Gill, T., Fleck, D. (eds.). (2010). *Oxford University Press's handbook of the international law of military operations.* Oxford University Press, Oxford.
Goodrich, L.M., Hambro, E.I. (1949). *Charter of the United Nations.* Columbia University Press, Boston, 154ss.
Gordon, G. (2009). The oil platforms opinion: An elephant in the eye of a needle. *Amsterdam Law Forum, 1 (2),* 135ss.
Harvard Research in International Law. (1935). Law of Treaties. *American Journal of International Law, 29,* 1185ss.
Heffes, E., Frenkel, B. (2017). The international responsibility of non-state armed groups: In search of the applicable rules.

Göttingen Journal of International Law, 8 (1), 40ss.
Helgeson, E., Lauterpacht, E. (2000). *Iran-US claim tribunal.* Cambridge University Press, Cambridge.
Herzog, P.E., Weser, M. (2014). *Civil procedure in France.* ed. Springer, Berlin, 163ss.
Higgins, R., Webb, P., Akande, D., Sivakumaran, S., Sloan, J. (2018). *Oppenheim's international law: United Nations*. Oxford University Press, Oxford.
Hollis, D.B. (2020). *The oxford guide to treaties.* Oxford University Press, Oxford.
Hurst, C. (1921-1922). The effect of war on treaties. *British Yearbook of International Law, 2,* 38ss.
Institute of International Law. (1985). The effect of armed conflicts on treaties, art. 1. *Annuaire de l'Istitut de Droit International,* 201ss.
Jacovides, A. (2011). *International law and diplomacy. Selected writings by Ambassador Andrew Jacovides.* ed. Brill, Bruxelles, 49ss.
Jessup, P.C. (1948). *A modern law of Nations*. Macmillan, New York, 154ss.
Lansing, R. (1910). The North Atlantic coast fisheries arbitration. *University of Pennsylvania Law Review and American Law Register, 59 (3),* 123ss.

Layton, R. (1962-1963). The effect of measures short of war on treaties. *University of Chicago Law Review, 30,* 114ss.
Lee, L.T. (1991). *Consular law.* Oxford University Press, Oxford, 113ss.
Liakopoulos, D. (2020a). *Complicity of states in the international illicit*. ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020b). *The role of not party in the trial before the International Court of Justice.* ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2022). Qui tacet consentire videtur si loqui debuisset ac potuisset v. quo tacet neque negat neque utique fatetur (he who remains silent is considered to consent, if he must and can speak v. he who remains silent neither rejects nor accepts-affirms). *American Yearbook of International Law, 1(1).*
Liivoja, R. (2008). The scope of the supremacy clause of the United Nations Charter. *International and Comparative Law Quarterly, 57,* 585ss.
Mcintryre, S.H. (2012). *Legal effect of world war II on treaties of the United States.* ed. Springer, Berlin, 162ss.
Mcnair, A.D. (1961). *The law of treaties.* Oxford University Press, Oxford, 698ss.
Mcrae, D. (2012). The work of the International Law Commission 2007-2011: Progress and prospect. *American Journal of International Law, 106 (2),* 323ss.

Meron, T. (2000). The humanization of humanitarian law. *American Journal of International Law, 94*, 241ss.

Nolte, G. (2013). *Treaties and subsequent practice.* Oxford University Press, Oxford.

Nortmann, M., Reinisch, A., Ryngaert, C. (2015). *Non state actors in international law.* Bloomsbury Publishing, New York, 174ss.

Nuňez-Mietz, F. (2020). *The use of force under international law.* ed. Routledge, London & New York.

Orakhelashvili, A. (2010). Diplomatic law: Commentary on the Vienna Convention on Diplomatic Relations, consular law and practice. *Nordic Journal of International Law, 79 (2),* 340ss.

Pellet, A. (2014). *The charter of the UN. A commentary.* Oxford University Press, Oxford.

Rayfuse, R. (2014). *War and the environment. New approaches to protecting the environment in relation to armed conflict.* Martinus Nijhoff Publishers, The Hague, 180ss.

Reichel, P., Albanese, J. (2013). *Handbook of transnational crime and justice.* Sage Publications, New York.

Roithmaier, K. (2023). Ensuring state responsibility in proxy warfare: The concept of state complicity in violations of international humanitarian law by non-state armed groups. *European Journal of Legal Studies, 14 (2),* 144ss.

Schrijver, N.J. (1994). The use of economic sanction by the UN Security Council: An international law perspective. In H.G. Post, *International economic law and armed conflict.* ed. Brill, Bruxelles, 128ss.

Schwartzberg, J.E. (2016). *Transforming the UN system designs for a workable world.* Brookings Institution Press, Tokyo, New York, Paris, 2016.

Schwarzenberger, G. (1967). *A manual of international law.* Cambridge University Press, Cambridge, 194ss.

Simonds, S. (1992). Conventional warfare and environmental protection: A proposal for international legal reform. *Stanford Journal of International Law, 29,* 192ss.

Sloss, D.L. (2016). *The death of treaty supremacy. An invisible constitutional change*. Oxford University Press, Oxford, 358ss.

Sobenes Obregon, E., Samson, B. (2017). *Nicaragua before the International Court of Justice: Impacts on international law.* ed. Springer, Berlin.

Stanley, T., Lesser, S. (1953). International law-treaty provisions dealing with the status of pre-war bilateral treaties. *Michigan Law Review, 51,* 574ss.

Starke, J.G. (1963). *An introduction to international law.* Butterworth & Co., London, 411ss.

Van Dijk, B. (2022). *Preparing the war. The making of the Geneva Conventions.* Oxford University Press, Oxford.
Vöneky, S. (2000). A new shield for the environment: Peacetime treaties as legal restraints of wartime damage. *Review of European Community and International Environmental Law, 9 (1),* 22ss.
Walker, H. (1957-1958). Modern treaties of friendship, commerce and navigation. *Minnesota Law Review, 42,* 807ss.
Whiteman, M.M. (1970). *Digest of international law.* Washington, 511ss.
Wilmshurst, E., Breau, S. (2008). *Perspectives on the ICRC study on customary international humanitarian law.* Cambridge University Press, Cambridge, 43ss.
Zemanek, K. (1977). *General course on public international law.* Recueil des Cours de l'Académie de Droit International. ed. Brill, Bruxelles, vol. 158, 232ss.
Zrilic, J. (2019). *The protection of foreign investment in times of armed conflict.* Oxford University Press, Oxford, 218ss.
Zyberi, G. (2007). The development and interpretation of international human rights and humanitarian law rules and principles through the case-law of the International Court of Justice. *Netherlands Quarterly of Human Rights, 25*, 119ss.

Accountability and international responsibility of the UN operations

DOI:10.5281/zenodo.10572682

Sylvie Neigh, post Ph.D, Legal advisor, UK

Introduction

The topic of protection of victims from human rights violations by the United Nations (UN) has been a questionable topic for years as well as connected with peacekeeping operations. The verified violations by peacekeeping operations are particular for the discussion of the responsibility attributed to the UN (Reinisch, 2000) and not to the Member States (Summers, Gough, 2018), or to third parties injured by the violations that preclude access to justice both to national courts and to international bodies as a guarantee of human rights treaties. Within this framework, dispute resolution managed by the UN has become a unique model for victims to obtain justice

(Liakopoulos, 2020a, Liakopoulos, 2020b; Liakopoulos 2020c)[527]. The aim of this work is to speak for the resolution of disputes envisaged in peacekeeping operations and established in the missions of recent years as well as the settlement of disputes with third parties in a de iure condendo perspective as a presumption of reform for the advancement of the jurisdictional protection offered as a prejudice attributed and codified by offenses offered to the UN.

Peacekeeping, international operations, crimes and victim protection

The jurisdictional or quasi-jurisdictional control of the UN activities is accomplished and organized by the powers conferred by the former Chapter VII of the UN Charter (Alledo, 2021; Alland, 2021) and is rather complete but limited. Time passes, needs are different and on the other hand the organization enjoys immunity from civil jurisdiction where internal judges are given

[527]United Nations District Court, E.D. New York: Georges v. United Nations, 834 F.3d 88, no. 15-455 (2d cir. 2016). LaVenture and others v. United Nations and others of 23 August 2017, 279 F. Supp. 3d 394 (E.D.N.Y. 2017). District Court of The Hague, Mothers of Srebrenica v. The Netherlands, case no C/09/295247/HA ZA 07-2973, decision of 16 July 2014.

a privilege that has an absolute nature. Civil actions for compensation for damage caused in peacekeeping operations are shielded from immunities on states' conduct, the judicial authorities have recognized immunity of an absolute nature to the UN and compliant with the treaty obligations on human rights where other types of remedy were not present and available to the appellants, thus determining the restriction of the individual right of access to the judge.

These arguments and issues are placed before the European Court of Human Rights (ECtHR) as an inter partes Court which has sought to evaluate the recognition by national courts of the immunities that are provided for by the UN and as a conduct of a violation of the guarantees which are offered by Art. 6, European Convention of Human Rights (ECHR). Within this framework we recall the cases: Waite and Kennedy and Beer and Reagan v. Germany[528], where the ECtHR spoke of "(...) a clear orientation based on the balance between the recognition of immunities to international organizations, on the one hand, and the procedural guarantees referred to in Art. 6 ECHR on the other hand, in light of which the legitimacy of the restrictions on the right of access to the judge was subordinated to the existence of alternative

[528]ECtHR, Waite and Kennedy v. Germany and Beer and Reagan v. Germany of 18 February 1999.

remedies for the individual made available by the organization (...)" (Liakopoulos., 2020b).

We note the proposed "alternative remedies test" that was developed and applied by the ECtHR in relation to disputes concerning officials of organizations without addressing future rulings relating to claims for compensation of damages caused to third parties of peacekeeping operations. The ECtHR was asked to evaluate the presence of remedies that are made available to the UN in the face of the decisions of the Dutch courts such as recognition in civil courts of compensation for the damage promoted by the association of victims of the Srebrenica genocide and the principles of law from the cases that are preceded by the denied states (Klabbers, 2015; Papa, 2016; Van Der Have, 2017; Gasseling, 2017; Ryngaert, Spijkers, 2019; Ryngaert, Istrefi, 2021; Morris, 2022)[529]. Continuing with the Chapman v. Belgium[530] and Klausecker v. Germany[531] cases there has been recognition of the immunities which according to NATO and the European Patent Organization in relation to internal proceedings connecting to employment relationships and organizations arising from the activities of the Security Council

[529]ECtHR, Mothers of Srebrenica et al. v. the Netherlands and the United Nations, op. cit.

[530]ECtHR, Chapman v. Belgium of 5 March 2013.

[531]ECtHR, Klausecker v. Germany of 6 January 2015.

entail a type of illegitimate restriction of the right to access to judge. The test of alternative remedies includes some doubts given that it determines a control of variable intensity which respects the guarantees established by Art. 6 ECHR (Rainey, Wicks, Ovey, 2021). The internal proceedings established by the officials of the organizations in relation to employment relationships and to actions for compensation for damages and of a non-contractual nature are promoted by third parties. Respect for the typologies of disputes is considered for the individual granted the broadest protection when all the international organizations provide adequate means of appeal of a jurisdictional nature in favor of their own officials as guarantees of the relevant process which corresponds to the standard of protection guaranteed by Art. 6 ECHR confirmed by ECtHR itself.

If this were not the case, the mechanisms aimed at resolving disputes between organizations and third parties are devoid of employment relationships and have suffered even serious damage to their rights that are existing, adequate and effective. Not to subject the conduct of the UN to the scrutiny of national courts, we highlight the inoperability and international level of the guarantee bodies established by human rights treaties as the organization is not part of the aforementioned treaties. The

international bodies are so lacking in the necessary competence to control and evaluate the appeals presented through the UN while the requests addressed to the Member States must have as a basis to be admissible the relative involvement of the same ones so as to be able to attribute to them the relative conduct of illicit, exclusively or jointly with the UN.

The international responsibility of the UN is implemented according to the methods that are provided for by general international law and as they are codified by the International Law Commission (ILC) in relation to the project of Draft of Articles on the Responsibility of International Organizations (DARIO) (Liakopoulos, 2020a). The fencing of an interstate nature of implementation of accountability that has been envisaged by the ILC has shown factual evidence to be a limited tool and especially in cases of human rights violations that are attributable to the UN. Member States have asserted the responsibility of the UN as the modalities envisaged by the DARIO and have demonstrated relative inertia over time in the face of the illicit acts committed by the UN given that these consist of serious violations of human rights (Liakopoulos, 2020c).

The relative passive inertia is recorded among the states harmed by the offenses committed by the UN, i.e. typically by the states

that host peacekeeping operations in their territory. The host states justify the deployment of missions in their territories, preventing them from taking a critical attitude towards the UN. It is significant that the actions promoted against the UN to protect individuals have been prevailed by states other than the host ones and specifically by Western states where the nationality of the victims enjoy diplomatic protection. A passive inertia shown by host states towards the offenses committed by the UN in their territories and which has called into question the censorships not only of a political nature but also from a legal point of view (Mègret, 2019). Host states are required to protect the violation of human rights and individuals under their jurisdiction as required by the treaties concluded on the subject. The offenses committed by the UN imply and arise positive obligations for the host state to protect the claims of the victims of the UN by resorting to all relevant diplomatic and jurisdictional means as necessary objectives[532].

[532]The UN to protect injured individuals can take place according to traditional means that are elaborated by state disputes, through protests and are invited to negotiation for ad hoc commissions of inquiry and by resorting to peaceful settlement mechanisms of judicial disputes. Within this context we recall the SOFAs agreements which are concluded between the UN and the host state providing for the possibility of deferring to an arbitration procedure where any disputes have arisen between the parties

The reaction towards the wrongdoings of the UN places Member States that are other than the aggrieved one in a position that respects the UN by invoking responsibility and avoiding bearing the financial consequences, contributing thus to the necessary resources for the reparation of the illicit. Erga omnes rights are not without special interests and are direct, precise and against one's economic interests. The concern of Member States regarding the fulfillment of financial obligations to redress wrongdoing places the UN as a central point in understanding the implementation of the responsibility of the UN. The different circumstances make the UN faced with alternative mechanisms, fundamental for ensuring the victims of crimes to a precluded form of justice and reparation. It differs from any other type of control that exists at a national and international level given the provision of remedies of an internal nature which provides that the supervision of the work is carried out from an internal perspective according to the process of the self-control in the concept of accountability and “international responsibility” (Klabbers, 2009).

---

and not resolved through negotiation.

Remedies within the UN context. Commissions' claims and creation of local committees

The internal dispute resolution mechanisms of the UN and as a not very evolutionary control the operations of the peacekeeping show a step in time that matures towards an experience in the field of new technologies through unarmed drones, etc., such as a growing awareness regarding environmental protection and including the system of remedies that is foreseen in the missions that remain established according to the fifties of the last century and never concretely implemented. The 1946 Convention on the privileges and immunities of the United Nations (CPIUN)[533] provided for some alternative remedies to counterbalance the recognition of immunities from civil jurisdiction where they are enjoyed within the framework of the UN. Section 29 CPIUN entitled "Settlements of Disputes" "(…) make(s) provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party (Schmalenbach, 2016) (…)". Status of Forces Agreement (SOFA), signed in 1957 between the UN and the host state of the UNEF operation, provided for the

[533]Convention on the Privileges and Immunities of the United Nations of 13 February1946: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-1&chapter=3&clang=_en

establishment of a "standing claims commission" competent to examine claims for compensation for harm caused to individuals in the context of the mission. It was then incorporated into the 1990 SOFA Model[534]. This is regularly reproduced in subsequent SOFAs up to the most recent agreements[535].

The claims commissions are based on the logic of an arbitral remedy which was composed of three members and the appointment of a Secretary General of the UN, one from the host state, by a member president to be elected on the nomination of the President of the International Court of Justice (ICJ) due to failure to reach agreement. This is a remedy that has to do with independence, impartiality, as an adequate means of dispute resolution and as provided for by Section 29 CPIUN (Okada, 2018). Such commissions have never been seen in practice despite the numerous peacekeeping operations established and could not have constituted an alternative for national forums,

[534]Art. VII ("settlement of disputes") of par. 51 affirms that: "(…) any dispute or claim of private character to which the operation or any member thereof is a party and over which the courts of [the host state] do not have jurisdiction because of any provision of the present agreement, shall be settled by a standing claims commission to be established for that purpose (...)" (UN Doc. A/45/594 of 9 October 1990).

[535]https://publications.iom.int/system/files/pdf/No-Escape-relationship-slavery-abuse-internal-displacement.pdf

thus recurrently precluding the immunity regime applicable by the UN.

The practice of the UN has not followed the model of arbitration that was envisaged in the fifties, orienting itself towards the institution of the local claims review boards, i.e. local panels or committees, offices of an administrative nature in the peacekeeping mission which have as their objective to negotiate the amicable solution of disputes regarding compensation for damages caused to third parties after death or injury to persons and/or property which are caused by acts attributable to the scope of the UN. The local committees are organized by three officials of the legal training organization (Grenfell, 2012) without the relative "obligation" of independence as stated by the Secretary General: "(...) local claims review boards, just and efficient as they may be, are United Nations bodies, in which the Organization, rightly or wrongly, may be perceived as acting as a judge in its own case (Boon, 2019a)[536]. Local committees' decisions are not subject to review, nor is the information relating to the applications submitted and how they were assessed public and accessible, although the general principle of transparency should also apply to the UN's dispute management activity, especially where there are no strict confidentiality requirements

[536]UN Doc. A/51/903 of 21 May 1997, par. 10.

that require its secrecy (…)" (Peters, 2016)[537].

For local committees even today their role is not in the light but incomplete, in shade and with various and difficult topics of discussion to arrive at conclusions and concrete statements. On the one hand, the substantive law applicable to disputes which makes up a hybrid framework of regulatory sources, the so-called internal liability law (Schmalenbach, 2006) includes the general principles of law relating to civil torts which are inspired by the common law system and according to the one the host state (Schmalenbach, 2017). On the other hand, the secondary rules of general international law for the issues that concern the attribution of illicit conduct according to the unwritten rules that are produced and emerged from the practice of the local panels themselves, i.e. the actual settlement, is in practice "(...) a body of rules not codified by the Organization, with the exception of the well-known restrictions introduced by the Secretary General towards the end of the nineties[538], following a high number of individual complaints presented in the context of operations conducted in Somalia and Congo (…)". Restrictive clauses are

[537]See also the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, UN Doc. A/RES/67/1 of 30 November 2012, par. 2.

[538]UN Doc. A/51/389 of 20 September 1996, par. 20, and UN Doc. A/51/903, op. cit., par. 10.

aimed at limiting the responsibility of the UN and the amount of compensation for damage awarded to third parties, from a temporal point of view, as they limit the possibility of presenting an appeal within the period of six months from the moment in which the damage occurred, and from a financial point of view, to the extent that they reduce the amount of the compensable sum within the maximum limit of 50,000 dollars, and exclusively in relation to material damage (Schmalenbach, 2017).

The operational necessity as a circumstance of exclusion of the liability of the UN includes[539] the clauses limiting the liability of the UN which are contained in the reports of the Secretary General and are also incorporated in the Resolution of the 52/247 adopted by the General Assembly of the 1998 and included in the agreements of the SOFAs[540]. The application of this type of limitation results in the possibility for the individual to obtain the adequate injury suffered (Wellens, 2002; Bodeau-Livinec, 2013; Ferstman, 2017; Ferstman, 2019) despite the doubts and the compatibility of themselves with the secondary norms of international law regarding reparation of torts.

We note the remedies established in the administrations of territories such as what we saw in Kosovo, i.e. the Human Rights

[539]UN Doc. A/51/389, op. cit., par. 13.

[540]UN Doc. A/RES/52/247 of 26 June 1998.

Advisory Panel (HRAP) where the UN has attributed the relative competence to verify whether the UNMIK complies with the relevant legal parameters from the main nature international instruments and human rights issues including the ECHR (Nowicki, Chinkin, Tulkens, 2017; Hirschmann, 2019)[541]. After the end of its activities, the HRAP was considered as an attributable mechanism in relation to accountability remedies which has a para-jurisdictional nature with an operation that is similar to that of international human rights treaty guarantee bodies, as well as to mechanisms of mediation that are established by international financial organizations such as the World Bank inspection panel (Klein, 2010). This is not a perfect system and one that covers all the problems especially due to the lack of decision-making power of a binding nature and the incompetence of the conduct committed by KFOR, the establishment of the HRAP as a turning point in the evolution of a self-monitoring system where the UN faces requests for justice relating to victims of crimes (Klein, 2012; Chinkin, 2019). The HRAP model has not found a point of replication in relation to peacekeeping operations as a complete and unique model within the scope of the organization despite the fact that its

[541]UNMIK, Regulation n. 2006/12 on the Establishment of the Human Rights Advisory Panel in Kosovo of 23 March 2006.

recommendations are species that have economic compensation in favor of the victims expect to be fully implemented.

What happens with the practice? What kind of trend does it follow?

A current trend in practice dates back to the protection of third parties against the illicit conduct of the UN which is verified by peacekeeping operations. The interpretation, also dubious, noted by the Secretariat of the UN regarding the requirements of admissibility of requests for compensation for damages presented before local committees. The section 29 CPIN and art. VII of the Model SOFA ask the UN to "(...) guarantee an "adequate" remedy with respect to disputes of a "private" nature arising with third parties (...) claims having a "private" character, a notion which, used in the context of complaints against the UN, is in itself rather ambiguous, has given rise to a significantly restrictive interpretation by the Secretariat (…)" (Alland, 2021).

Within this context, we note the lead contamination of the refugee camps in Kosovo which were organized by UNMIK (Boon, 2016) as well as the spread of the cholera epidemic in Haiti in relation to the MINUSTAH mission (Mègret, 2013; Garcin, 2015) where the Secretariat considered "(...) the

complaints presented by the victims before the local committees, qualifying them as having a "political" and not a "private" nature, as the examination of the appeals would have implied, in the opinion of the itself, a revision of the "political" mandate of the missions in question (…), a variant of the "political question doctrine", to the extent that it aims to remove certain categories of appeals from the scrutiny of the local committees, in order to avoid interference with the political mandate of the mission (...) compared to the traditional (and often controversial) ones. The evaluation regarding the unquestionability of the "political" conduct of the UN comes, in the cases in question, not from a third and impartial tribunal, but from the Secretariat of the UN itself Organization, which, moreover, maintains an absolute monopoly on the interpretation adopted by it, not being subject to any form of internal or external control (…)" (Ferstman, 2017). The requirements for admissibility of complaints have been confirmed in positions that enter into the spirit of the Secretariat. "(...) The local committees would be competent to examine only requests for compensation for damages of a contractual nature, with the exception of road accidents and issues relating to property rights[542] (...) requests for compensation deriving from

[542]Pedro Medrano, Assistant UN Secretary-General, Senior Coordinator for Cholera Response, a Ms Farha et al., of 25 November 2014, par. 87ss.

violations of human rights would risk being excluded from the competence of local committees, as well as, more generally, the tort liability of the Organization, which would be removed, subject to the aforementioned exceptions, from the obligation to compensate for damage caused to third parties (…)" (Taxil, 2017).

Speaking of a restrictive interpretation that emerges following the presentation of requests for compensation for damages, we recall the spread of the cholera epidemic in Haiti and the deaths it caused as well as the infections likely to affect the financial resources of the UN, between crises of liquidity, delays in the payment of state contributions and public expenditure in national systems that were undoubtedly in a critical phase.

The UN has developed a peculiar reparations practice oriented in various directions by witnessing an appeal by the Secretary General and the apologies he gave towards the victims of the wrongdoings. Apologies were given both to individuals affected by the cholera epidemic as well as to those exposed to lead contamination. These measures are given without causing financial burdens on the budget of the UN, presenting certain ambiguities given that offers of formal apologies coming from high officials of the organization have a value not only political but also moral, precise, as a legal path and as a form of

satisfaction of the tort. If not accompanied by other forms of reparation that include individual financial compensation, the apologies are without any substance, such as harm caused to the victims by carrying out guarantees of a preventive and reparative function. The mere offer of an apology does not free the UN from obligations deriving from the wrongful act where the victims' requests have been oriented in another direction in the cases under evaluation.

Let us not forget that the UN practice has been organized towards the establishment of voluntary funds which are intended for the victims of crimes with compulsory contributions coming from the Member States and made up of donations both in favor of the victims of the cholera epidemic and from sexual abuse, of victims of lead contamination as we have seen in the case of the UN Haiti Cholera Response Multi-Partner Trust Fund[543], of the Trust Fund in Support of Victims of Sexual Exploitation and Abuse[544], and of the Trust Fund in support of the Ashkali, Egyptian and Roma communities[545]. Not imposing on states the relative payment of compulsory contributions as a limit to the establishment of funds financed with resources based exclusively and in a voluntary manner undermines the possibility for victims

[543] https://press.un.org/en/2016/dev3248.doc.htm

[544] www.un.org/preventing-sexual-exploitation-and-abuse/content/trust-fund.

[545] www.un.org/press/en/2017/sgsm18538.doc.htm.

to obtain a form of compensation for the damage suffered. The Trust Funds established by the UN were poorly used and filled by voluntary contributions. Regarding lead contamination, the trust fund finances collective assistance projects despite the criticisms of the special procedures experts of the Human Rights Council of the UN.

As regards the Haiti case, the funds established were used to fill collective assistance projects which are intended for the affected communities, constituting the distinctive elements of the UN's practice in terms of reparation. State practice in dealing with violations has led to a high number of requests for compensation which are favored by forms of reparation of a collective nature that respect compensation on an individual basis (Tomuschat, 2007). On a restorative level, collective measures are adopted following an independent process of consultation and negotiation with the victims and are not verified in the cases in question. A comparison with the large-scale appeals management model is developed in transitional justice processes where the forms of collective reparation comes from direct involvement with the victims, even unilaterally, and establishes such a responsible and useful subject (Freedman, Lemay-Hebert, Monroy-Santander, 2021).

In the face of mass claims, economic compensation on an

individual basis can be limited where the UN finds a fair compromise between the limited economic capacity and the needs of the victims in relation to the so-called second-best measures (Ferstman, 2017), as complete compensation for the wrongdoing deducing the standard of full repair as was also noted in Art. 31 DARIO to a satisfactory extent (Liakopoulos, 2020a).

Remedies over time: lights and shadows

From the birth of the UN system until today, the remedies for claims for compensation for damages caused by peacekeeping operations do not take us forward towards the creation of a system of effective remedies for victims of an alternative nature to national jurisdictions and before to the enjoyment of absolute immunity. Compared to the model of arbitration commissions and envisaged in the SOFA agreement of 1957, a worrying logic has arisen for the jurisdictional protections offered to injured parties. The functioning of the local committees that we have seen so far highlight the shortcomings and independence that come within the scope of the due process. The practice developed by the local committees is a limiting and heterogeneous outline that includes the illicit practices of international responsibility for the violation of human rights. This is a discretion in the

functioning of the local committees based on the uncertainty relating to the procedural law applied to the gracious nature of the compensations which are arranged on the basis of equity, as well as the interpretation in peius of the conditions of admissibility of the appeals adopted by the Secretariat (Klein, 1998).

The protection of injured third parties in the context of peacekeeping operations represents a peacekeeping model that is administered by the UN. There is no permanent judicial or quasi-judicial mechanism competent to examine individual complaints for human rights violations that are attributable to peacekeeping operations. The local committees with an obsolete and inadequate way in the face of the pressure of presenting appeals, especially mass claims, is an unprecedented practice and to a large extent not contemplated since 1946 and after, when the initial topic was the protection of numerous individual appeals from political interference of Member States (Boon, 2016).

The Secretariat, through limitations and restrictive interpretations justified or not, has oriented itself towards the lex specialis as an exception to the general rules on the subject of reparation. The clauses limiting the liability of the UN, especially the ability to compensate for damage caused to individuals, are disseminated and codified through the DARIO. Within this context the

Secretariat stated that: "(...) the obligation to make reparation, as well as the scope of such reparation, must be subject, in the case of the UN, to the rules of the organization, and more particularly, to the lex specialis rule within the meaning of Draft Article 63, including, in this notion, the mentioned financial and temporal limits introduced to limit the amount and type of damages compensable by the Organization (…)" (Mahdi Razavi, Babaee, Hatami, Tavakoli Tabasi, 2016; Ferstman, 2017; Voulgaris, 2019; Johansen, 2019)[546].

The reference to the specialty was supported by the Secretariat and is opposed to the orientation that is followed by the administrative courts of the UN by applying the general principles of international administrative law of global inspiration and orientation as a function that stands alongside any gaps present in the legislation internal labor law, giving greater protection to the claimants (Thèvenot-Werner, 2016). These are principles that concern labor law aspects such as the calculation of interests and costs, individual procedural guarantees with ample scope, equality of arms in judgment, the obligation to state reasons and guarantees of a fair trial.

The administrative courts of the UN according to the general principles of justice is a whole apparatus of dispute resolution

[546]UN Doc. A/CN.4/637/Add.1 of 11 February 2011, 30.

mechanisms since with a single legal system is not alien to the values and principles of justice. The request for justice of an individual nature at the foundation of the administrative tribunal system of the UN cannot be of a universal nature and aimed at all individuals.

Concluding remarks

From what we have seen so far we understand that not everything is going well and towards the path that has been created since the beginning of the genesis of the UN (Hovell, 2016). We immediately understand the lack of the apparatus of effective remedies of peacekeeping missions as an anachronistic system if we consider the direction taken by other international organizations which have established various types of remedies of a jurisdictional nature stricto sensu. The organization itself appears receptive to the change in guaranteeing the protection of individuals. The reference to the HRAP of Kosovo, as well as the system of resolution of labor disputes between the UN and its officials witnessing a double level of judgment and jurisdictional guarantees stricto sensu are introduced to reforms and improvements made without lack of criticisms.

Such improvements have to do for example with individuals without an employment relationship with the UN, such as the

recipients of the so-called smart sanctions which are adopted in the context of the sanctioning regimes created by the Security Council. The Resolution 1904 (2009) of the Security Council established the conciliation mechanism and is available to the sanctioned subjects, i.e. the Ombudsperson created by the ISIL (Da'esh) and Al-Qaeda Sanctions Committee and was operational exclusively for the Committee and not for the other thirteen Sanctions Committees. The Ombudsperson has the task: "(...) of receiving requests for cancellation from the lists coming directly from individuals and entities registered in the ISIL (Da'esh) and Al-Qaeda Sanctions List, as well as recommending, if deemed valid, their removal to the Committee. The establishment of this body is (...) the result of an evolutionary process, triggered by the (implicit) dialogue established between the Organization and various institutional actors, especially of European origin (…). However, there is still a broad debate on the capacity of the Ombudsperson to act as an effective remedy for the sanctioned individuals, its notable "persuasive" power must be acknowledged: the recommendations to cancel the names are in fact generally accepted by the Sanctions Committee (...) the means of resolving contractual disputes have undergone a process of revision and evolution such that today, in many cases, the possibility is contemplated for private parties to establish

arbitration with the Organization (...)"[547].

It is coherent and necessary for the UN to take into account the binding nature of human rights obligations, thus committing to a reform and improvement of the internal system of remedies available in the context of peace operations, representing an area where individuals are exposed to the relative risk of violations of their rights by the UN. A de iure condendo perspective as a functional model of dispute management provides a procedure that is divided into a dual path (Ferstman, 2017). Initially, we have to do with the procedure that influences liability appeals as an exclusive nature of domestic law and within the limits of the threshold of damages that can be compensated according to the rules of the UN.

Local committees can continue to exercise the function of amicable dispute resolution. Appeals that have a higher value than a threshold that implies the responsibility of the UN, according to public international law. Appeals examined by an independent body with jurisdictional or quasi-jurisdictional guarantees and competent to rule on the basis of international human rights standards. The UN has shown that they do not want to submit an external jurisdictional mechanism but an internal one that respects accountability and is based on a remedy

[547] https://press.un.org/en/2023/sc15229.doc.htm

modeled, as we have seen in the HRAP. Various suggested proposals arise which include mechanisms such as the Central Claims Commission (Schrijver, 2016), an Ombudsperson (Schrijver, 2013; Garcin, 2015), a Standing Claims Commission (Schmitt, 2017), a Standing Inspection Panel (Hoffmann, Mègret, 2005; Garcin, 2015), a Reparation Commission (Hovell, 2016) and a Human Rights Panel with binding powers (Chinkin, 2019).
Do the contributed dynamics realize expectations of yet another reform of the UN in the near future? The different factors are relevant due to the focus on the reputation of international organizations (Daugirdas, 2015) as a key that motivates and brings about institutional improvements to their own system. Organizations will be sensitive to the construction of their externally image, depending on their legitimacy. The perspective of a present dynamic of an evolutionary life of organizations has many of the improvements of the reforms brought by the UN to the dispute resolution system as the result of the establishment of national and international disputes through the Member States and especially the noted scandals, the protests, critical issues that aim towards the image of the organization itself (Klein, 2010). The establishment of internal accountability mechanisms of the UN, the Ombudsperson and HRAP give rise to criticisms and pressure showing that the pragmatism of finding intra-

institutional solutions to fill protection gaps and establish and maintain good image are arguments that have reached continuing scandals such as sexual abuse in peacekeeping operations (Boon, 2019b), as well as the recognition of an intense form of protection in the context of labor disputes as justice under pressure especially if the reputation of the UN as an employer is not like once upon a time.

The strategy of the so-called “name and shame” despite the lack of recognition of individual compensation to the victims seems to give priority to a state will as well as limits the contributions that are paid to the organization including those for the reparation of the harm caused to individuals in the context of peacekeeping operations.

The peacekeeping operating system with some margins for evolution may come from the use of strategic litigation by the victims. The presentation of appeals before national courts and international quasi-jurisdictional bodies is oriented towards a favorable outcome of appearance within the system of organizational immunity, the incompetence ratione personae of the bodies that mobilize public opinion in relation to the behavior undertaken by the UN to restore one's own image of the birth of the organization. The intra-institutional confrontation after the cholera case between the Secretariat and the experts of the

Human Rights Council resumes with a formal complaint sent by the NGOs assisting the victims (Mègret, 2019)[548] in the face of a dispute brought against the Haitian government and before their national courts. In the case of lead contamination, the dialogue undertaken by the experts of the human rights council with the Secretariat can lead to new developments regarding the near future. The measure of action of non-state actors will be effective not as a dynamic of implementation but as a kind of international responsibility of the UN in the evolution of internal dispute resolution mechanisms accessible to third parties.

[548] http://www.ijdh.org/wp-content/uploads/2020/02/FINAL-HLS-IHRC-IJDH-BAI-Submission-to-Special-Procedures-Cholera-2-6-2020.pdf?eType=EmailBlastContent&eId=1419ba4d-130a-4960-a1a7-b3c13a634af9

References

Aledo, L.A. (2021). *Le droit international public.* Dalloz, Paris.

Alland, D. (2021). *Manuel de droit international public*. PUF, Paris.

Bodeau-Livinec, P. (2013). Les faux-semblants de la lex specialis. L'exemple de la résolution 52/247 de l'Assemblée générale des Nations Unies sur les limitations temporelles et financières de la responsabilité de l'ONU. *Revue Belge de Droit International, 46,* 118ss.

Boon, K. (2016). The United Nations as good samaritan: Immunity and responsibility. *Chicago Journal of International Law, 16,* 341, 558ss.

Boon, K. (2019a). Rethinking the accountability. Immunity axis through remedies. *International Organizations Law Review*, *16*(1), 140ss.

Boon, K. (2019b). Reputation and the accountability gap. *American Journal of International Law Unbound, 113,* 234ss.

Chinkin, C. (2019). *United Nations accountability for violations of international human rights law.* ed. Brill, Bruxelles. Recueil des cours, vol. 395, 215ss.

Daugirdas, K. (2019). Reputation as a disciplinarian of International Organizations. *American Journal of International Law, 113 (2),* 222ss.

Daugirdas, K. (2015). Reputation and the responsibility of International Organizations. *European Journal of International Law, 25 (4),* 995ss.

Ferstman, C. (2017). *International Organizations and the fight for accountability. The remedies and reparations gap.* Oxford University Press, Oxford, 106-107.

Ferstman, C. (2019). Reparations for mass torts involving the United Nations. Misguided exceptionalism in peacekeeping operations. *International Organization Law Review, 16 (1),* 42 ss.

Freedman, R. (2014). UN immunity or impunity: A human rights based challenge. *European Journal of International Law,* 25 (1), 8ss.

Freedman, R., Lemay-Hebert, N., Monroy-Santander, L. (2021). Seeking justice for the victims of cholera in Haiti: Framing the reparations debate through transitional justice. *Human Rights Quarterly, 43 (3),* 570ss.

Garcin, M. (2015). The Haitian cholera victims' complaints against the United Nations. *Heidelberg Journal of International Law, 75,* 678ss

Gasseling, K. (2017). The legacy of Srebenica. Potential consequences of reducing liability for troop contributing countries in modern UN peacekeeping operations. *Boston College of International and Comparative Law Review, 40 (2),*

348ss.
Grenfell, K. (2012). Effective reparation for the victims of wrongful acts committed during UN peace operations: How does it work concretely?. In Proceedings of the Bruges Colloquium. *International organisations' involvement in peace operations: Applicable legal framework and the issue of responsibility.* College of Europe, 126ss.
Hirschmann, G. (2019). Guarding the guards: Pluralist accountability for human rights violations by international organisations. *Review of International Studies 45 (1),* 24ss.
Hoffmann, F., Mègret, F. (2005). Fostering human rights accountability: An Ombudsperson for the United Nations?. *Global Governance, 11 (1),* 44ss.
Hovell, D. (2016). Due process in the United Nations. *American Journal of International Law, 110,* 4ss.
Jakubowski, A., Wieczyńska, K. (2016). *Fragmentation vs the constitutionalisation of international law: A practical inquiry.* Routledge, London & New York, 2016.
Johansen, S.Ø. (2019). Dual attribution of conduct to both an international organisation and a Member State. *Oslo Law Review, 6 (3),* 180ss.
Klabbers, J. (2009). *An introduction to international institutional law.* Cambridge University Press, Cambridge, 296ss.

Klabbers, J. (2015). *An introduction to international organizations law.* Cambridge University Press, Cambridge.
Klein, P. (1998). *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens.* Éditions de l'Université de Bruxelles, Bruxelles, 298ss.
Klein, P. (2010). Panels, Médiateurs et Mécanismes Informels de Contrôle des Activités des Organisations Internationales: Entre Accountability et Responsibility. In J. Crawford, S. Nouwen (eds.). *Select proceedings of the European Society of International Law.* Bloomsbury, New York, 234ss.
Klein, P. (2012). Le Panel consultatif des droits de l'homme (Human Rights Advisory Panel) de la MINUK: Une étape dans le processus de responsabilisation des Nations Unies?. In M. Kohen and others (eds.). *Perspectives of international law in the 21st Century. Liber Amicorum Christian Dominicé.* Martinus Nijhoff, Leiden, 228ss.
Liakopoulos, D. (2020a). *Complicity of states in the international illicit.* ed. Maklu, Antwerp, Portland.
Liakopoulos, D. (2020b). *International organizations and reparations.* W.B. Sheridan Law Books, ed. Academica Press, Washington, London.
Liakopoulos, D. (2020c). *Complicity in international law.* W.B. Sheridan Law Books, ed. Academica Press, Washington, London

Mahdi Razavi, S., Babaee, M., Hatami, M., Tavakoli Tabasi, A. (2016). The rule of lex specialis, as a field for the operation of principle of specialty of international organization. *Public Law Research, 17,* 170ss.

Mègret, F. (2013). La responsabilité des Nations Unies aux temps du choléra. *Revue Belge de Droit International, 46 (1),* 162ss.

Mègret, F. (2019). Beyond UN accountability for human rights violations. Host state inertia and the neglected potential of sovereign protection. *International Organizations Law Review, 16 (1),* 72ss.

Morris, T. (2022). State responsibility and accountability in UN peacekeeping: The case of The Mothers of Srebrenica v. The Netherlands. *International Peacekeeping, 29 (2),* 209ss.

Nowicki, M., Chinkin, C., Tulkens, F. (2017). Final report of the human rights advisory panel. *Criminal Law Forum, 28,* 82ss.

Okada, Y. (2018). Interpretation of article VIII, section 29 of the Convention on the Privileges and Immunities of the UN. Legal basis and limits of a human rights-based approach to the Haiti cholera case. *International Organizations Law Review, 32 (2),* 278ss.

Papa, M.I. (2016). The m*others of Srebrenica* case before the European Court of Human Rights: United Nations immunity versus right of access to a court. *Journal of International*

Criminal Justice, 14 (4), 898ss.
Peters, A. (2016). International organizations: Effectiveness and accountability. *MPIL Research Paper Series,* 12ss.
Rainey, B., Wicks, W., Ovey, C. (2021). *Jacbos, White and Ovey: The European Convention on Human Rights.* Oxford University Press, Oxford.
Reinisch, A. (2000). *International Organisations before National Courts.* Cambridge University Press, Cambridge.
Ryngaert, C., Istrefi, K., 2021. Introduction: Special issue: The legacy of the mothers of Srebrenica Case. *Utrecht Journal of International and European Law, 36 (2),* 115ss.
Ryngaert, C., Spijkers, O. (2019). The end of the road: State liability for acts of UN peacekeeping contingents after the Dutch Supreme Court's judgment in Mothers of Srebrenica. *Netherlands International Law Review, 66,* 540ss.
Schmalenbach, K. (2006). Third party liability of International Organizations. A study on claim settlement in the course of military operations and international administrations. *Yearbook of International Peace Operations, 10,* 33, 52ss.
Schmalenbach, K. (2016). Disputes settlement (Article VIII sections 29-30 General Conventions). In A. Reinisch (ed.). *The Conventions on the privileges and immunities of the United Nations and its specialized agencies: A commentary.* Oxford

University Press, Oxford, 530ss.
Schmalenbach, K. (2017). International Organizations or Institutions, Legal remedies against act of organs. *Max Planck Encyclopedia of Public International Law,* par. 24.
Schmitt, P. (2017). *Access to justice and International Organizations. The case of individuals victims of human rights.* Edward Elgar Publishers, Cheltenham, 202ss.
Schrijver, N. (2013). Beyond Srebrenica and Haiti. Exploring alternative remedies against the United Nations. *International Organizations Law Review, 10 (2),* 598ss.
Summers, J., Gough, A. (2018). *Non-state actors and international obligations. Creation, evolution and enforcement.* ed. Brill, Bruxelles, 180ss.
Taxil, B. (2017). Les réclamations de particuliers contre les operations de paix onusiennes: les défallances du système à la lumière de l'affaire du choléra. *Annuaire Français de Droit International, 63,* 234-244.
Thèvenot-Werner, A.M. (2016). *Le droit des agents internationaux à un recours effectif: vers un droit commun de la procédure administrative international.* ed. Brill, Bruxelles, Boston, 982ss.
Tomuschat, C. (2007). Reparation in favour of individual victims of gross violations of human rights and international

humanitarian law. In M. Kohen (ed.). *Promoting justice, human rights and conflict resolution through international law. Liber Amicorum Lucius Caflisch.* ed. Brill, Leiden, 570ss.
Van Der Have, N. (2017). *The prevention of gross human rights violations under international human rights law*. ed. Springer, Berlin.
Voulgaris, N. (2019). *Allocating international responsibility between Member States and international organizations.* Hart Publishing, Oxford & Oregon, Portland.
Wellens, K. (2002). *Remedies against International Organisations.* Cambridge University Press, Cambridge. 163-164.

International responsibility and reparations in the Inter-American human rights system

DOI:10.5281/zenodo.10572728

Dr. Christian G. Sommer, Professor and researcher of Public International Law (National University of Córdoba, Catholic University of Córdoba and Siglo 21 University). Argentina.

Dr. Victorino F. Sola Professor and researcher of Constitutional and Conventional Procedural Law (Catholic University of Córdoba, National University of Córdoba and Siglo 21 University) Argentina.

Preliminary notes

The damages caused by human rights violations, as explained in the doctrine, take-on a double dimension: on the one hand, they acquire an individual aspect, which is the harm caused to the victim (and to each of the members of his family environment), while, on the other hand, they have a collective importance, which refers to the harm caused to society as a whole (as to its social sphere). Likewise, this type of injury has a multiple nature,

for example, in a situation of violation of the right to life or personal integrity, its effects range from physical and psychological suffering to the destruction of life projects and alterations in the conditions of existence of the victim and his family, producing immediate sequelae over time (Saavedra Alessandri, 2005).

When states carry out actions or omissions that involve damages such as those mentioned above, the victims usually have national and international mechanisms to claim for the acts that violate their rights and possible reparation. Without adequate reparation, there is no legal certainty or justice, which the legal order has endeavored, with varying results, to guarantee the gradual and sufficient reparation of the right of the victims and-by this means-of the interest of society. This arduous battle initially waged at the domestic level, has long since reached the international arena (García Ramírez, 2020). And this even though it is not infrequent that the actions of state bodies aimed at achieving adequate access to justice and reparation of the damages caused are not always effective, or prevent adequate assistance to the victims.

The history of Latin America is marked by international armed conflicts, national political and armed crises, etc., which have led to serious violations of the human rights of the region's

inhabitants. In most of these situations, impunity is the rule due to the lack of state action in investigating, prosecuting, and eventually convicting those responsible (Caballero Ochoa, García Puerta, Arjona Estevez, 2020). At the same time, since the approval of international human rights instruments in Latin America, it can be seen that states or non-state armed groups are responsible for serious violations. We can mention everything from disappearances of persons, torture, extrajudicial executions, etc., to difficulties in accessing domestic courts or in conducting judicial proceedings with a lack of due process guarantees, to claims by indigenous and tribal peoples, women, the elderly, children, and adolescents, etc, who also fail to find-in the national judicial system-the necessary reparations for the transgressions that have occurred.

In this context, the work of the inter-American human rights protection bodies has played a substantial role in the formulation of standards of protection that empower individuals to claim their observance from the state. As part of the work of the Inter-American Court of Human Rights (hereinafter, IACHR), attention to the victims of the violations suffered and, above all, the obligation of the state authorities to -fully remedy the harm caused constitute, at present, a significant contribution to the search for effective justice. Hence, this paper seeks to provide a

sample of the various decisions on reparations to victims (and their families) that the records of the Court of San José contain since its first pronouncements at the end of the 1980s.

Reparations are a necessary basis for victims to find the end of a long road of claims, in which one can appreciate how the Inter-American Court has constructed various interpretations of the different ways to remedy human rights violations. Certainly, this is not a minor fact in the discourse of the Inter-American Court: its judges evolve with their standards, which-then-circulate when used in the argumentation of other international or national courts and put in contact with the operators of diverse (and, in some cases, even interconnected through a model of multilevel protection) legal systems that contribute to the emancipatory force of human rights (Piovesan,2017; Arcaro Conci, Mezzetti, 2017).

With these premises, it is possible to anticipate a central argument that will run through this article and that has been supported by specialists: the transformative mandate in the inter-American -space-makes it clear that the work of the regional human rights Court goes far beyond deciding whether in the specific case there was a violation of conventional principles and precepts since creative and far-reaching reparations orders have become a key to transformative constitutionalism (Von

Bogdandy, 2019).

The international responsibility of states and respect for human rights

As with any activity that the state carries out with other subjects of the international community (mainly other states), the responsibility to act under the international commitments undertaken persists. In the case of state responsibility for violation of human rights standards, the question arises: in all circumstances must the state be held accountable for the acts and/or deeds imputed to it; if it must be held accountable for the acts and/or deeds of any state institution, is it not possible to exempt itself from responsibility; if so, for what period and under what conditions would it be appropriate to exclude its duty to respond; and so on.

The answer to these questions raises suggestive challenges. One of them is associated with the (very current, by the way) circumstance of the absence, beyond some normative provisions in particular in international human rights instruments, of a binding international document of a general nature, based on which the responsibility of states in cases of non-compliance with an international obligation is established. Most of the

jurisprudence and doctrine uses as a reference criterion-the International Law Commission (hereinafter, ILC) Project/Draft entitled: International Responsibility of States for Internationally Wrongful Acts, which was approved on 9 August 2001 -by the United Nations General Assembly (hereinafter, DARSIWA). This proposal goes back almost 40 years and constitutes one of the most relevant contributions to the codification and progressive development of one of the most relevant areas of international law. The work began in 1956 under the direction of F.V. García Amador (Cuba), in his capacity as Special Rapporteur, who served from 1955-1961. He was followed later by Roberto Ago (1963-1979), Willen Riphagen (1979-1986), Gaetano Arangio-Ruiz (1987-1996) and James Crawford (1997-2001).

Establishing the existence of international responsibility entails identifying, as indicated in the aforementioned draft, conduct consisting of (i) an act or omission that violates an international obligation (Articles 2 and 12 DARSIWA, without the intention or fault of the offending party being relevant); (ii) that is imputable to the responsible state through some of its organs or acts of third parties (Articles 4 et seq. of DARSIWA) (Conforti, 1995; Remiro Brotons, 1997; Brownlie, 1998; Gutierrez Espada, 2001; Monroy Cabra, 2002; Shae, 2003; Pérez Gonzalez, 2005; Barboza, 2007; Rey Caro, 2008; Feit, 2010). In addition, if the wrongful act

causes damage, another obligation of the state may arise, such as the obligation to make reparation (Article 31 DARSIWA). This secondary obligation of international law has been widely enunciated in international jurisprudence. Reference may be made to early decisions such as the claims in the British Claims in the Spanish Zone of Morocco case, where Arbitrator Max Huber held that it is an indisputable principle that responsibility is a necessary corollary of rights, emphasizing that all rights of an international order have as a consequence an international responsibility (U.N.R.I.A.A, 1925). One cannot fail to recall the oft-cited Fabrica de Chorzów case, in which the Permanent International Court of Justice held:"(...) it is a principle of international law, and even of a broader conception of law, that any breach of an obligation includes an obligation to make reparation" (PCJI,1928).

In this sense, when a state signs and ratifies an international treaty, it undertakes to adopt all necessary measures for its compliance and validity, eliminating the obstacles that may arise in its execution by internal entities. This obligation is also subject to the commitments assumed, according to Article 27 of the 1969 Vienna Convention on the Law of Treaties (VCLT), not to attempt to justify its domestic law to infringe or evade an international commitment. From this perspective, responsibility

constantly accompanies states insofar as they are required to act by international law and to exhibit the necessary disposition to account for their legal acts or omissions before this normative order. It can be understood, therefore, that responsibility is based on the precept of good faith contained in the principle pacta sunt servanda, under which it is obliged to comply with the provisions of any treaty in force (Article 26 VCLT).

The ILC commentary to the above-mentioned draft states that article 1 covers relations arising under international law from the internationally wrongful act of a state "(...) or even of other subjects of international law" (ILC Rapporteur, 2001). Thus, the general rule of state responsibility set out in article 1 is expressed in the following formulation: Every internationally wrongful act of a state entails the international responsibility of that state. At the same time, for an act to be attributable to a state, some of the conditions set out in the DARSIWA must be met.

Therefore, Article 4 of the PREI stipulates that the conduct of any organ is considered an act of the state in international law, regardless of whether that organ exercises legislative, executive, judicial, etc. functions and regardless of the position it occupies in the organization of the state. In addition to what has been said so far, consideration should be given to the time in which a wrongful act by a state may constitute a breach of an

international obligation that gives rise to a duty of international responsibility:

(i) as regards the executive branch of government, the acts that could give rise to international responsibility are acts or omissions incompatible with state's obligations, which may arise from the acts of officials operating within the limits of their powers or at the instruction of the government. Some of the clearest examples refer to the case of a President or Head of State signing a treaty that restricts any of the internationally recognized human rights;

(ii) For its part, the legislative branch is characterized by its production of laws as legal acts of the state, since through them its organs express their will. A frequent example of an unlawful act in this sense is the enactment of a law that contravenes a treaty in force or the omission to enact legislation necessary for the implementation of a given international commitment;

(iii) for the rest, the actions of the judiciary are attributable to the state and generate its international responsibility when the courts of justice violate international standards relating to the administration of justice (e.g., unjustified delays in criminal proceedings).

From the outset, the members of the Commission expressed their interest in analyzing aspects of the international responsibility of

states for violations of international human rights norms. And in the contributions of Rapporteur García Amador, there are already reflections on the obligations of states to apply a single standard of treatment to the human person, the rights that also dealt with legal property, the physical and psychological integrity, and freedom of the person, etc (Ferrer Lloret, 1998).

It is not always, of course, the principal organs of the state that generate the transgression of the international obligation. It is common for such responsibility to arise in a federal state subdivision or decentralized organ. The conduct of the organs also includes the conduct of any person or entity that-, under domestic law, exhibits the corresponding status. Thus, in the Moses -case, which was the subject of a decision of the Mexico-USA Joint Claims Commission-, it was noted to this effect:

"(...) an official or person vested with authority thus represents his government, which, in the international sense, is the sum of all officials and persons vested with authority (More, 1898)".

Likewise, in the case Certain German Interests in Polish Upper Silesia, the PCIJ states:

"(...) from the international point of view and the point of view of the Court as an organ, domestic laws (...) express the will of states and constitute state activities, in the same way as legislative decisions or administrative measures" (PCJI, 1923).

Beyond the organs or subjects performing the acts giving rise to state responsibility, the conduct for which the state is accountable may consist of a single act or a succession of events over some time. Therefore, to be exonerated from international responsibility, the national authorities must demonstrate the achievement of a certain result in seeking to choose subsequent means to remedy the breach of the obligation (and this is to avoid the accomplishment of the initial action of the wrongful act) (Ago, 1977). As has been argued, for facts that are not of a single time (i.e., continuous, compound, or complex), it is obvious that their greater or lesser prolongation- over time- usually entails on a qualitative level a greater or lesser gravity of the fact itself from the point of view of the injury to the subjective right and, therefore, is likely to have an impact on the degree of international liability and, specifically, on the extent of the reparation (Diez de Velasco, 2005).

Hence, articles 14 and 15 of DARSIWA establish a series of rules about acts of the state that are prolonged in time. On the one hand, in continuous events, the breach of the obligation extends over the period in which the event is contrary to an international obligation. Moreover, in episodes that constitute a breach of an international obligation to prevent, the breach extends over the entire time during which the event(s) giving rise to it is

prolonged. Finally, in those events occurring through acts and omissions of an unlawful nature, the transgression extends over the period beginning with the first of the acts or omissions in the series and continues as long as they are repeated and are not ceased by the domestic authorities.

Specifically, it is clear from the criteria of the DARSIWA that those who suffer the unjust infringement of their rights expect much more than declarations, they need and demand reparations, they expect compensation, satisfaction, the return-whenever possible-of what has been taken from them without right or reason. The same is true of society, whose grievance against some of its members becomes, in the end, a grievance against all (and which, in this sense, compromises the peace, security, and justice of the whole). And, finally, whoever consummates the tort or must respond to it (strictly speaking, the state in the international order) faces the jurisdictional declaration of responsibility but also the consequent assumption of inherent obligations (which translate into actions, commitments, benefits, etc., covered by the common denominator of reparation) (García Ramírez, 2020).

Some general considerations on reparations in international law

Historically, reparations in international law were concentrated on those demanded by states for violations of an international obligation contracted between them, without individuals reaching international jurisdictional instances for the sake of their recognition.

However, the use of became more moderate and-progressively-the individual was empowered to bring claims in international venues (Remiro Salvioli, 1995; Kawabata, 1997; Brotons, 1997; Bassiouni, 1998; Danieli, 1998; Minow, 1999; Shelton, 1999; Tomuschat, 2002; Shaw, 2003; An-Naim, 2003; García Ramírez, 2003; Gialdino, 2003; Pisillo Mazzeschi, 2003; Bauxbaum, 2005; Ferrer Lloret, 2005; Diez de Velasco, 2005; Salado Osuna, 2005; Falk, 2006; Cançado Trindade, 2007; López Zamora, 2007; Pérez Leon Acevedo, 2008; Drnas, 2009). Access to international forums for redress constitutes a decided legal (as well as moral) advance of the present era and, consequently, transnational courts have consolidated an interpretative practice of an expansive nature (i.e., beyond the positive terms set forth in international documents). Such progress should be considered by the national authorities as instruments to optimize their habits and procedures of access to reparation measures (Salvioli, 2019).

It is well known that in the framework of state responsibility, reparation for a wrongful act takes the form of restitution, compensation or satisfaction under Articles 34 to 39 DARSIWA. Reparation of the damage caused by the breach of an international obligation may consist of full restitution (restitutio in integrum), which includes the reestablishment of the previous situation and reparation of the consequences produced by the breach and/or the payment of compensation for pecuniary and non-pecuniary damage. Compensation, on the other hand, is the most usual form of reparation.

By using the terms reparation and compensation, we are in fact referring to two different notions that are in a relationship of genus to species. In the international sphere, a distinction is usually made between so-called compensation and damages, which species of reparations can be implemented. When a state expropriates private property in the exercise of its sovereign power, payment of damages is not normally required, but is usually stipulated through compensation (also labeled indemnification).

With respect to the calculation of the reparation, it is considered that it can be of a complex nature to the point that it often requires the participation of experts for the appraisal. If the wrongful act has been committed, the guiding principle is that

reparation should, as far as possible, restore the situation that would have existed if the unlawful event had not occurred. Thus, in settling the Chorzów Factory case, the CPJI expressed such principle in the following terms:

"(...) the essential principle which enshrines the actual concept of an illegal act, a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals, is that reparation for the illegal act must, as far as possible, wipe out all the consequences of the action and restore the situation which would have existed if the illegal act had not been committed" (P.C.I.J, 1928).

In parallel to this obligation to make reparation as a consequence of international responsibility, the obligation not to repeat the violation has been applied in international practice. The obligation to provide assurances and guarantees of non-repetition goes beyond the principle of good faith, under which states are expected to act in order not to repeat the acts that gave rise to international responsibility. In effect, what is at stake is that the responsible state should generate-in a real and tangible manner-all the necessary conditions so that the unlawful acts committed do not happen again.

The reparations regime in the Inter-American human rights system

The international systems for the protection of human rights, created as conventional mechanisms for the citizens of the states parties to resort to exceptional jurisdictional instances in the event of violations of human rights treaties, have assumed-in recent decades-an exponential demand in their operation. Certainly, during this period, the image of the bodies of the Inter-American System has been promoted in the public agenda of many atates as mechanisms that, although they have helped to consolidate the rule of law and respect for human rights in a democratic society, have also been a hard nut to crack for governments reluctant to abide by the decisions of the Inter-American Commission Human Rights (IAComHR).

One of the most influential tools in the inter-American Human Rights System (hereinafter, IAHRS) has been the performance of the Rapporteurships of the IAComHR. In this sense, e.g., the work carried out by the Office of the Rapporteur for Freedom of Expression has generated significant claims against some states, mostly denounced for attempting to restrict freedom of expression in their territories, under the spurious justification of expanding free expression, while conditioning or excluding the flow of communication of media outlets critical of their public

administrations or government measures.

This fact has progressively implied a series of state reactions, in some cases very clear, by encouraging practices that delay the tutelary reaction of the Inter-American System of Human Rights (ISHR) or by encouraging threats to denounce the American Convention on Human Rights (ACHR). Recall, among others, the examples of Peru when former President Fujimori tried to exclude the application of the ACHR in the face of the continuous complaints against his state in the La Cantuta and Barrios Altos cases, the withdrawal of Trinidad and Tobago from the jurisdiction of the Inter-American Court of Human Rights (IACHR) or-more recently-the case of Venezuela, where former President Chávez described the system as an extension of the North American "Empire" and-under those reasons- promoted the denunciation of the Convention in order to avoid the numerous petitions filed against his state and the increasingly conclusive sentences of the IACHR (particularly in the well-known cases of López Mendoza and Díaz Peña, which generated the claim of the state and its reluctance to comply with the sentences of the Court of San José for considering them to be in violation of its sovereignty.

Although international human rights law has succeeded in recent times in making the principle of non-interference in the internal

affairs of states more flexible, it is no less true that it is corroborated by the fact that some highest domestic authorities seek (under the argument of national sovereignty) to bend the respect and control of human rights to the aegis of their exclusive state power.

It is clear that the regional or universal human rights systems have had the boom that has only been seen in the last half century, precisely because of the repeated failures of states to guarantee human rights in their jurisdictions. The constant use of the system by victims, non-governmental organizations and the states themselves has allowed for a mechanism for the protection and promotion of human rights that, within the inter-American perimeter, is facing an important debate on where and how to advance in reforms aimed at further strengthening its institutions and, at the same time, an adequate treatment of the parties in conflict (both citizens and the state itself).

It should be added that international or regional protection systems reveal a subsidiary nature to national schemes, i.e., they operate as an ultima ratio when states have failed to provide due protection to the rights of individuals, or have failed to do so because they are insufficient. In the Inter-American human rights system, reparation is the way to respond to human rights violations committed by states within the framework of the

international norms to which they have committed themselves (Pasqualicci; 1996; García Ramírez, 2001; Shelton, 2004; Nash Rojas, 2007; Rodríguez Pinzón, 2007; Rojas Baez, 2008; Drnas, 2009; Salvioli, 2010; Espejo Yaksic, Herencia Carrasco, 2011; Rousset Siri, 2011; Leiva García, 2012; Salmon, 2012; Antkowiak, 2012; Calderón Gamboa, 2013; Cançado Trindade, 2013; Steiner, Uribe, 2014 Schneider, 2015; Carbonell, Caballero González, 2016; Badillo, Muñoz, 2018; Grossman, Del Campo, Trudeau, 2018; Santiago, Bellocchio, 2018; IACHR Court, 2021).

It is important to note that the-ISHR-has a main instrument for the protection of human rights, the ACHR, approved by the OAS. The initiative to create a Convention materialized in November 1969, when the Inter-American Specialized Conference on Human Rights was held in San José, Costa Rica. The ACHR was drafted, which established the creation of the two main bodies (the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, respectively), responsible for supervising respect for and guarantees of the rights contained in the various inter-American documents.

In this sense, the ACHR regulates a provision on the right to reparation in accordance with the functions that its organ of control of international responsibility (i.e., the IACHR) can

exercise. Article 63(1) states:

“ (...) when it decides that there has been a violation of a right or freedom protected by this Convention, the Court shall order that the injured party be guaranteed the enjoyment of his right or freedom that was violated. It shall also order, if appropriate, that the consequences of the measure or situation that led to the violation of those rights be remedied and that fair compensation be paid to the injured party” (OAS, 1969).

As will be mentioned in the following sections, the IACHR has developed-a jurisprudence on reparations that represents the crown jewel within the boundaries of the ISHR, at least since the concept of integral reparation in cases of human rights violations has nourished the inter-American legal system with a view to the gestation of structural transformations: once the international responsibility of the state is established, the obligation to make integral reparations arises. Thus, the jurisprudential interpretation of Article 63 of the ACHR by the Court of San José has filled the obligation to make reparations with its own content (Morales Antoniazi, 2019).

Of course, this is a constantly evolving jurisprudential reading in which each decision brings new developments to the legal consequences of violations of international human rights, and whose criteria and guidelines thus established by the Inter-

American Court of Human Rights contribute, to a decisive degree, to the integration of the ius commune of human rights in the continent. The clarification that since Art. 63 of the ACHR is a suggestive but reduced formula, its interpretative result highlights the similarity between the performance of the constitutional courts (called to maintain the relevance of the supreme texts in new contexts) and the work of the international human rights courts to fix-according to an inexorably progressive criterion-the meaning of the supreme formulas of a legal order, that is, through the systematic reconsideration, with a current view, of texts written years ago and under other circumstances (García Ramírez, 2020).

Victims as recipients of reparations

The international systems for the protection of human rights, created as conventional mechanisms to enable the citizens of the states parties to have access to exceptional jurisdictional instances in the event of violations of human rights treaties, have not remained static. On the contrary, they have been subject to continuous modifications in their internal regulations and processes. In particular, the necessary adaptation of the ISHR is no exception (beyond the reforms to the rules of procedure of the

IACHR and the IACHR that have taken place substantially over the last 35 years).

Here it is appropriate to dwell on the role of the victims in the ISHR because they have progressively acquired greater procedural relevance (Sommer, 2014). In several cases brought before the IACHR, some victims were not heard by the regional court, since-according to the regulations that initially governed it-was the power of the IACHR to determine-in detail the possible victims and their presentation before the inter-American judicial forum (IACHR, 1980, 1991, 1996, 2000). The variations introduced through the regulatory changes of 2003 (Article 23) and the jurisprudential work of the IACHR, among other aspects, increased the space for victim's participation, reformulating their role in human rights protection proceedings (Cançado Trindade, 2003; Medina Quiroga, 2011).

Thus, as of the aforementioned modification of the IACHR regulations, the alleged victims, their next of kin or their representatives can participate directly in all stages of the process *(*locus standi in judicio*)* and, in this sense, provide evidence and present particular positions to the IACHR, different from those of the IACHR itself, both in procedural and substantive aspects or from the perspective of reparations, although the IACHR still retains the power to conclude whether or not to elevate a case to

the Court of San José-requesting the victims or their representatives to activate per se the jurisdiction of the court (Camarillo Govea, 2018).

In turn, with the regulatory innovation of the IACHR in 2009 (Article 35.2), the regional court made it possible that when the IAComHR has not specifically identified victims, the transnational court will have a margin of consideration to include other victims according to the evidence collected before that instance. If the cases thus considered and the reasons that led to these modifications are appreciated, their application is detected primarily in cases of massacres and in hypotheses of a considerable number of victims (IACHR Rio Negro Massacre v. Guatemala, 2012; IACHR Nadege Dorzema et al. v. Dominican Republic, 2012; IACHR Cacarica River Basin (Operation Genesis) vs. Colombia, 2013; IACHR Workers of the Hacienda Brasil Verde vs. Brazil, 2016).

Also concerning the victims access to justice, it should be noted that-as of the 2009 regulatory change (Article 37) indicates that in cases of alleged victims without duly accredited legal representation, the Court may appoint an ex officio Inter-American Defender to represent them during the processing of the case and the figure of the Inter-American Defender was introduced, to solve the difficulties of their access to the

jurisdiction of the IACHR for economic reasons (i.e., when they were unable to avail themselves of paid legal assistance).

Thus, we went from a conception in which the IACHR decided (even against the victim's claims) which rights it would bring before the IACHR for violation of the Convention and related treaties, to a position in which currently, although the IAComHR retains a relevant role in the proceedings, it acts-in the end-as a mere procurator of the victim's representatives (who do not appoint private representatives) and even in parity of criteria with them. It is not superfluous to recall that the 2003 and 2006 versions of the Rules of Procedure provided that the IAComHR appointed its delegates and could include representatives of the victims, but the latter were subject to the Commissioners' orders. When the 2009 reform took place, although the IAComHR maintained its role as the procedural subject that brings the case before the IACHR Court and expresses itself on the facts of the case, the victims and their representatives can act with procedural legitimacy in the hearings before the Court itself (Article 40 of the Rules of Procedure of the IACHR).

On the other hand, it is appropriate to point out that a significant part of the cost of litigation not covered by the IACHR has usually been borne by the victims' representatives and the litigant organizations themselves, thus using resources destined for the

defense of other matters and which are not always compensated in the judgments of the IACHR (as has been pointed out by non-governmental organizations specialized in the ISHR) (Cejil, 2006; OEA, 2011). This lack of adequate compensation for costs and expenses encourages a malicious attitude on the part of some states in the region, not only because they do not bear the financial consequences associated with unnecessary delays and procedural obstruction, but also because they inhibit victims from bringing a case before the ISHR (at least, since they hardly trust that the expenses they will incur will be reimbursed).

In this regard, a timely proposal has been made to the states to create a legal assistance fund for victims and representatives who come before the IAHRS, as already exists in other jurisdictional spheres (e.g., the International Criminal Court (ICC), (ICC, 2005). As a result of this proposal,-at its 38th session,-the General Assembly approved a resolution creating the "Legal Assistance Fund of the Inter-American Human Rights System" (OEA, 2008), which aims to facilitate access for petitioners who do not have financial resources, especially for legal expenses. It should be noted that, to date, many cases before the ISHR are assisted by professionals on a pro bono basis, as they belong to non-governmental organizations dedicated to litigation before the aforementioned system. In November 2009, the Permanent

Council of the OAS approved Resolution CP/Res. 963, which put into operation the Rules of Procedure of the Fund, without prejudice to the fact that the IACHR Court established Rules of Procedure that entered into force on June 1, 2010, and the IAComHR did the same with the implementation of its Rules of Procedure, which entered into force on March 1, 2011.

The conceptual boundaries of the notion of integral reparation

The scope of the standards of reparation in the ISHR is not expressly set out in the Convention, whose Article 63 describes only generic aspects that the states agreed upon around 1969. In contrast, the progressive work of the Inter-American Court has been the result of a gradual interpretation of the scope of the types of damages and modes of reparation applicable to victims of violations of regional international instruments.

As a consequence of this hermeneutic practice, as of the other exegeses that the regional human rights Court has sponsored, it is difficult-for the states parties to-evade the standards of state responsibility for human rights violations and-even more, difficult for them-to avoid making adequate reparations to the victims. It should be recalled that they have the primary

obligation to investigate and prosecute those responsible for violations of conventionally protected rights and, in any event, to make adequate reparations for the damages suffered.

This has led the Inter-American Court-in its history of more than 40 years-to build guidelines on the scope of damages and reparations not only in contexts of violations provided for in the Convention but also due to the application of general standards and principles derived from general international law, international criminal law, international humanitarian law, international environmental law, etc. (IACHR Serrano Cruz Sisters v. El Salvador, 2000; Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica-Operación Génesis-vs. Colombia, 2013; Advisory Opinion OC-23/17, Environment and Human Rights, 2017).

Such standards have been key in framing the applicable law and the overall interpretation of state obligations (and not so much domestic norms). However, this has not been free from criticism insofar as the San José Court departs from any consideration of norms that, although they are of evidentiary relevance to the particular case, have a national practice and validity.

Indeed, if one analyzes the pronouncements in which the IACHR has ruled on the scope of the victims' right to reparations, one could make some classifications that make it possible to specify

the decisions of the regional court and the interpretative scope attributed to Article 63 of the Convention (and other concordant norms). Likewise, the Court of San José has evolved towards the following understanding: reparation is not reduced to a mere pecuniary issue but, on the contrary, it is projected as a healing institute equipped with an integrating effect of other aspects that make concrete state's conduct of remedying the victims. Thus, Cançado Trindade lists the saga of measures aimed at preserving and rescuing their honor, their right to justice, and even their right to the truth (Cançado Trindade, 2006).

In this endeavor, Inter-American judges have sponsored different types of reparations to contemplate-as a response-that the complex (and fluctuating) typology of damages requires the design of different specific measures (Calderón Gamboa, 2013). Thus, the powers of the inter-American judge, observes Carlos Ayala Corao:

“-are neither exhaustive nor restrictive, since they include the competence, in general, to reestablish the victim in the human rights violated by the state, to repair any consequences or harmful effects of the violation and the payment of fair compensation. Furthermore, this imprint of the aforementioned conventional provision allows the deployment of protective and reparatory powers that do not stop at the current victims but are

projected on the potential ones, requiring the states the most varied legislative, public policy, administrative, judicial, educational, etc. measures to prevent future transgressions (...)" (Ayala Corao, 2020).

Non-pecuniary damages

The first point is to identify the effects on human rights that translate into non-material damages, including moral and psychological damages, the impact on the life project, etc.

This type of damage is characterized: (i) by its lack of economic value (at least, if it is admitted that pain, uncertainty, etc., are not quantifiable vectors); (ii) by the compensatory damages as the usual reparatory mechanism that weighs the seriousness of the act and the intensity of the suffering caused (Ventura Robles, 2012); (iii) by the fact that the wrongful act can affect spiritual and moral values not only of an individual but also of a group (Nash Rojas, 2005); and, finally, (iv) because they do not need to be proved because of the evidence that, as a consequence of a transgression of human rights, the nature of the human person experiences spiritual pain, psychic suffering, moral anguish, etc. Specifically, it is sufficient to prove the vexations and aggressions that have occurred (IACHR 19 Merchants v.

Colombia, 2004).

Now, what damages are included in the universe of moral damages? Faúndez Ledesma (2004) reviews, among other examples, the damage to honor, suffering, pain, and even humiliation resulting from a genuine violation of the dignity of the human person, while other scholars postulate its association with the suffering of fear, suffering, anxiety, degradation, etc., and the inculcation of feelings of inferiority, insecurity, frustration, and helplessness (Rojas Baez, 2007). And what has been its development in the annals of the IACHR? The judicial discourse, in the first place, focuses on the psychological connotations of the injury (even when projected on physical or bodily suffering), as well as on the alterations to daily life (both of the victim and his family members), excluding those cases in which the Court of San José also inserts-within this category-the detriment of significant values for the human being (or his family group) (IACHR Trujillo Oroza v. Bolivia, 2002). Thus, for example, in sentencing the "Myrna Mack Chang vs. Guatemala" case, it warned that it is evident that the victim experiences not only bodily pain but also suffering before her death, which-in this case-was aggravated by the environment of harassment she was living in at the time (IACHR, 2003).

The IACHR has also inferred that the suffering or death of a person causes non-pecuniary damage to his children, spouse or partner, parents, and siblings (IACHR 19 Merchants v. Colombia, 2004:249), so that it can be presumed that parents have suffered morally because of the cruel death of their children (IACHR Aloeboetoe v. Suriname, 1993), as well as that the death of a person causes non-pecuniary damage to his siblings. In sum, the suffering originated to the victim "extends to the most intimate members of the family, especially those who were in close affective contact with the victim" (IACHR Bulacio v. Argentina, 2003).

Then, a careful reading of the jurisprudential repertoires of the regional human rights court leads experts to note that the frequency with which it appeals to a standard of objective measurement (Ventura Robles, 2012) to design a plethora of measures of satisfaction endowed with a trace of non-repetition and public repercussion. Therefore, discounting that the condemnation by the IACHR entails per se a form of satisfaction with a preventive bias (at least as an indicator of the international wrongdoing committed by the state) (IACHR "Street Children" (Villagrán Morales) v. Guatemala, 2001), the truth is that scholars bring up measures coined by the Inter-American jurisprudence that, under the canon of comprehensive reparation,

emphasize the rescue of the memory of the victims, the restoration of their dignity, the publicity of the official reprobation of the violations, etc (Calderón Gamboa, 2013).

From this enclave, the following examples can be found in Inter-American judicial law:

(i) the publication and dissemination of the conviction (often within 6 months of its notification), including translation into the language of indigenous and tribal communities and peoples whose rights were implicated in the case being prosecuted (IACHR Chitay Nechv. Guatemala, 2010);

(ii) the performance of a state act of public acknowledgment of international responsibility for the violation caused or for the lack of necessary protection for the victims (and its inadequacy). Its implementation, however, is not left to mere internal discretion, since its execution must meet the objective of redressing the victims (or their memory), be carried out in their language or tongue, and outline the violations declared by the IACHR in the presence of state officials and agents, as well as the victims and their next of kin, etc (IACHR Radilla Pacheco v. Mexico, 2009).

(iii) the commemoration of the victims with the purpose (not only honorary, by the way) of awakening the conscience to avoid the repetition of harmful acts, to keep alive their memory, and to

appease the moral suffering of their relatives through the placement of plaques in evocation of the act and rescue of their prestige, the allocation of state funds for the maintenance of religious spaces in which tribute is paid to the deceased victims, the designation of squares with their names, the construction of monuments also with their names or the investiture of those already existing, etc (IACHR 'Street Children' (Villagrán Morales et al.) v. Guatemala, 2001).

Of course, this is not an exhaustive or closed catalog. Thus, for example, Cançado Trindade adds-to the preceding menu -a measure of intense ethical value, since it is the public apology that is associated with the acceptance of the state's international responsibility, the forgiveness requested by the state for its violating acts and the justice that this constitutes for the victim (Cançado Trindade, 2006). Although -at first -the IACHR did not include this aspect in its decisions on reparations (even when requested by the petitioners), it should be noted (Calderón Gamboa, 2013:163) that it was only later that it altered this criterion, given that in subsequent judgments-it ordered the state to publicly apologize to the victims and they are next of kin (as happened in 2005 in the-case of the “Yean and Bosico girls”), in 2003 in-the “Bulacio” case by ordering the state to publish the operative part of the Judgment in the Official Gazette, and -

subsequently reissued-in 2006 based on the rulings in the "Goiburú" case (establishing that the state must carry out a public act acknowledging its responsibility for the disappearance of the victims) and the "Vargas Areco" case (ordering a public act in the community of the victim's next of kin since they were not present at the public hearing in the case).

In turn, damages of a psychological nature are those that entail a pathological alteration or modification of the psychic apparatus as a consequence of a trauma that exceeds any chance of verbal or symbolic elaboration, with the particularity that the Court of San José has on occasions ordered its reparation without individualizing it with a specific title, while on other occasions it has done so jointly with moral damages and on others autonomously (Calderón Gamboa, 2013).

However, what is interesting about the reparation mechanism for this type of damage is the variety of modalities used to make the duty to respond effectively: without discounting the awarding of compensation amounts, the execution of measures of satisfaction (with the scope already explained) and of a restitutionary nature (annulment of criminal records), rehabilitation measures appear on the scene by which the sentenced state is constrained to individually assess the victims and provide them with medical, psychological and psychiatric treatment, free of charge,

immediately and subject to the prior consent of the victim, psychological and psychiatric treatment free of charge, immediately and with their prior consent, even with the addition that such benefits must be provided through specialized state health institutions and without any type of restriction in time or to the physical or psychological requirements of the victim (IACHR Goiburú v. Paraguay, 2006).

Undoubtedly, the residence of the victims, as well as their circumstances and needs, must be contemplated in the state's response in favor of their rehabilitation, so that if they are not based in the place under the jurisdiction of the responsible state, the latter must pay the amounts applied to cover the treatment ordered and meet the expenses involved in their place of residence (IACHR Contreras v. El Salvador, 2011). Nor are there-any numerus clausus-inventories, since experts argue that the duty to investigate and punish can operate as a reparative component of this type of damage (Calderon Gamboa, 2013).

Finally, it should be noted that the damage to the life project, based on a holistic consideration of the victim's person, involves making a judgment on how the act of violation of human rights affects the future projections that she had for her life program at the time of the transgression based on factors of vocation, aptitudes, circumstances, personal aspirations, etc. that allow her

to reasonably set expectations and reach them (IACHR Cantoral Benavides v. Peru, 2001), although the victim's prospects for personal, professional and family development are also modulated. What does this specimen of damage, which is considered a pioneering advance in the field of IHRL comprise? According to the verdicts of the IACHR and based on the subject's options to lead his life and achieve the destiny he proposes, the judges of San José extend it to the hypothesis of total and irreparable loss or the assumption of considerable and very difficult to repair impairment of his opportunities for development (IACHR Loayza Tamayo v. Peru, 1998). Therefore, it has been ruled out in those cases in which the victim has died, given the impossibility of replacing the expectations of realization that every person reasonably cherishes (IACHR González (Campo Algodonero) v. Mexico, 2009).

Property damage

The jurisprudential concept of material damage refers to the:

“(...) loss or detriment of the victim's income, the expenses incurred due to the facts and the consequences of a pecuniary nature that have a causal link with the facts of the case” (IACHR Bámaca Velásquez vs. Guatemala, 2002).

However, this notion can be broken down into three important areas:

(i)Emerging damage: this label covers the detriment to the victim's assets as a result of the violation of his rights (Abreu Burelli, 2005) as well as the direct and immediate expenditures that he, his relatives, or representatives make reasonably and demonstrably to repair the unlawful act and nullify its effects (IACHR Velásquez Rodríguez v. Honduras, 1989). In short,- explains Claudio Nash Rojas, it-represents all the expenses incurred by the victims (or their representatives) on the occasion of the wrongful act (Nash Rojas, 2009).

Therefore, among the reimbursable items-primarily through compensatory damages-are listed the medical expenses for the physical or psychological improvement of the victim, expenses for his search and/or rescue, the loss suffered in his patrimony, the future medical expenses to generate welfare for the victim or his relatives, etc (IACHR “Street Children” (Villagrán Morales) v. Guatemala, 2001). In addition, funeral expenses, food and lodging expenses (IACHR Blake v. Guatemala, 1999) and even travel or visit expenses during the victim's deprivation of liberty (IACHR Cantoral Benavides v. Peru , 2001), etc. are also authorized. What is the evidentiary basis required? On some occasions, Inter-American judges have required specific proof of

each of the expenses and their link to the case (IACHR Velásquez Rodríguez v. Honduras, 1989), while on other occasions (in particular, when dealing with long periods of impunity or contexts of serious human rights violations), they have flexibly resorted to guidelines of equity to determine their compensability (IACHR Bámaca Velásquez vs. Guatemala, 2002).

(ii) loss of income or loss of profits: unlike the loss of assets derived directly and immediately from the facts, loss of profits refers exclusively to the loss of future economic income that can be quantified based on measurable and objective indicators (IACHR Loayza Tamayo v. Peru, 1998). What points of reference, then, should be used when quantifying this compensation section? It is explained that, among others, the life expectancy in the country at the time of the fact, the circumstances of the case, the legal minimum wage, the loss of a certain chance, etc., must be taken into account (Rojas Baez, 2008). It should be noted that, in contrast to what is corroborated in terms of damage to the life project, compensation for loss of earnings is not ruled out in the event of the victim's death; rather, in the event of a death caused by the transgressions that are the object of the conviction, the Court of San José determines the amount of compensation based on the income that the victim received and those that he would have received until his possible

natural death according to life expectancy, work progress, etc (IACHR Velásquez Rodríguez v. Honduras, 1989). On the other hand, it may well happen that the victim survives the sentenced violations, in which case the determination takes as a reference the period that he/she remained unemployed as a consequence of those violations so that the IACHR uses the remuneration received at the time of the violation as a basis for compensation (even without neglecting the impact of the inflationary process) (Ventura Robles, 2012b).

(iii) damage to family assets: as an annexed material compensation, the Inter-American Court also compensates the damage to the assets of the family members as a consequence of what happened to the victim (Ventura Robles, 2012b; Calderon Gamboa, 2013). Thus, it is common for scholars to mention, among others, the costs of relocation or change of residence for protection, obtaining new jobs, social reincorporation, or due to the loss of possessions caused by violence or persecution, etc. In this line of argument, the victim's next of kin-in the case Castillo Paez v. Peru (IACHR, 1998)-argued that the violations led to a series of harmful effects on their family fortune (bankruptcy of the father's business, sale of the family residence, etc.) so that the IACHR ruled that there was a causal link between the violation and the pecuniary damage, ordering the payment of a lump sum

(quantified according to equity guidelines) as compensation. It is worth mentioning that, before the case in question, the Regional Court of Human Rights held that it was entirely impossible (under the principle that his action had immeasurably multiplying effects) to oblige the perpetrator to erase all the consequences caused by his act (IACHR Aloeboetoe et al. v. Suriname, 1993). However, the Court has relaxed this rule in hypotheses in which, in real terms, there is general patrimonial damage caused to the family group (in the precedent in question, the disappearance of a member of the family, for reasons attributable to the state, which caused economic disruption to the family). It should be noted that-in subsequent decisions-this chapter of the material damage has already been recognized in the jurisprudential annals of the IACHR, by admitting that it has awarded compensation for such concept in cases:

“in which, even when there is no suitable mechanism to demonstrate the exact amount or value of the damage, it is evident from the facts that there is an economic detriment evidenced by factors such as the following: a substantial change in the conditions and quality of life derived as a direct consequence of facts attributable to the state; the incurring of expenses related to exile or relocation of the home; expenses for social reincorporation; expenses incurred to obtain jobs that were

lost as a result of the violations committed by the state; expenses related to the loss of studies; loss of possessions, as well as the detriment to the physical, psychological and emotional health of the affected family" (IACHR Baldeón García v. Peru, 2006).

State reparation measures: adequately investigating, prosecuting, and punishing the facts that led to the violations

A constant feature of the cases that reach the ISHR is that they are often based on violations of Articles 8 and 25 of the ACHR. That is, the violation is configured by the lack of application -in the states of -standards of access to justice for the victims and their families as well as a judicial process that offers guarantees of impartial investigation and proper procedure (For an in-depth analysis of the standards of Articles 8 and 25 (Salomon, 2011; Espejo Yaksic, Leiva García, 2012; Steiner, Uribe, 2014; Carbonell, Caballero González, 2016), also a key aspect in other international documents such as the United Nations Covenant on Civil and Political Rights (hereinafter, ICCPR) (Noor, 1981).

This has been seen in situations ranging from the most complex and massive, such as those recently reported in hypotheses of crimes against humanity, to cases in which only a few officials have been involved or events of lesser impact. In this regard, the

San José Court has insisted that impunity should not be perpetuated in the cases that come to its attention and that these situations are also contrary to the obligations that states have assumed internationally (IACHR Barrios Altos v. Peru, 2001; La Cantuta v. Peru, 2006; Masacre de Pueblo Bello v. Colombia, 2006; Goiburú v. Paraguay, 2006). Hence, the state's commitment to guarantee that the truth of the facts is known, as a right of justice for the victims, is highlighted (UNHCHR, 2006; OAS, 2005, 2006). In the same vein, the former United Nations Commission on Human Rights, in the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005) established-inter alia-: (i) every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes (principle 2); (ii) the state must preserve archives and other evidence concerning human rights violations and facilitate their knowledge, as a measure aimed at preserving the collective memory from oblivion and, in particular, preventing the emergence of revisionist and negationist theses (principle 3); (iii) irrespective of any legal action they may bring, victims and their families have an imprescriptible right to know the truth about the circumstances in which the violations were committed and, in the event of death or disappearance, about the victim's fate (principle

4); and, finally, (iv) it is incumbent upon states to take appropriate measures, including measures necessary to ensure the independent and effective functioning of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the judicial function. In any case, states should guarantee the production of archives relating to human rights violations and the possibility of consulting them. (aspects contemplated since its first rulings). The IACHR affirmed the existence of the right of the victim's next of kin to know the fate of the victim and, if applicable, where his remains are located, while noting that the right of the next of kin of victims of grave human rights violations to know the truth is part of the right of access to justice. On other occasions, the Court has repeated these positions (IACHR Garrido and Baigorria v. Argentina,1998; Castillo Paez v. Peru; 1998; Blake v. Guatemala, 1999; Fire Factory of Santo Antônio de Jesus vs. Brazil, 2020; Mota Abarullo et al. v. Venezuela, 2020).

From the point of view of international law, impunity for human rights violations constitutes a violation of the commitment assumed by states to respect and guarantee the exercise of human rights, and to provide victims with effective remedies to protect them. These obligations to investigate and prosecute adequately

have also been pointed out by the International Court of Justice, which considers that every state must immediately proceed to a preliminary investigation of the facts occurring in its territory and eventually prosecute them. In the matter of Questions relating to the Obligation to Prosecute or Extradite (Belgium vs. Senegal), (ICJ, 2012) can also appreciate the separate vote of Judge Cançado Trindade when he states:

"(...) the obligations of the state (under the conventions for the protection of the human person) to prevent, investigate and punish serious violations of human rights and international humanitarian law "are not mere obligations of conduct, but rather obligations of result", since we are faced with peremptory norms of international law that safeguard the fundamental rights of the human person (....) In the sphere of jus cogens, such as the absolute prohibition of torture, state's obligations are of due diligence and of result, otherwise, he adds, the doors would remain open to impunity".

According to Article 1.1 of the ACHR, the states parties are obliged to respect and guarantee all the rights and freedoms recognized in the Convention. While the obligation to respect implies limits on the actions of state organs and agents, which derive from the content of the rights protected by the treaties, the obligation to guarantee implies that states have to guarantee their

free and full exercise to all person's subject to their jurisdiction, without any type of distinction or discrimination (Parra Vera, 2012). Thus, this precept does not constitute a programmatic provision, since the ACHR finds direct application in all its clauses when an American state has signed, ratified, or acceded to it. The obligations contained in international conventional law, and particularly those referring to human rights, constitute for all national judges

"directly applicable law and in preference to domestic legal norms, since the legal system itself adopts Articles 36 and 31.1, on the one hand, and Article 27 of the Convention, on the other; the former determines the obligation to comply in good faith with international obligations (pacta sunt servanda and bona fide), and Article 27, in turn, establishes the duty not to create obstacles under domestic law to the fulfillment of international obligations" (Nogueira Alcalá, 2012; Rey, 2012).

The content of the obligation to guarantee has also been interpreted by the IACHR, since its first judgment in the case of "Velázquez Rodríguez v. Honduras" and has been reflected on several occasions. The IACHR expressed that this obligation implies the duty of the states parties to organize the entire governmental apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a way

that they are capable of legally ensuring the free and full exercise of human rights. As a consequence of this obligation, states must prevent, investigate and punish any violation of the rights recognized by the Convention and also seek to restore, if possible, the violated right and, where appropriate, to repair the damage caused by the violation of human rights. If the state apparatus acts in such a way that such a violation goes unpunished and the victim is not restored, as soon as possible, to the full enjoyment of his rights, it can be said that it has failed in its duty to guarantee the free and full exercise of those rights to the person's subject to its jurisdiction (IACHR Almonacid Arellano et al. v. Chile, 2006).

The judicial organs of a state have, therefore, a central role in the fulfillment of the obligation to investigate, prosecute and, where appropriate, punish human rights violations (Kleffner, 2003). To establish whether a state, through the actions of its judicial organs, has fully complied with its obligation to investigate, prosecute and punish, the Court of San José can examine the judicial proceedings carried out at the domestic level, since the function of the international court is to determine whether the integrity of the proceedings was per international provisions; this examination, then, aims to verify whether the proceedings have been conducted with respect for judicial guarantees, within a

reasonable time, and whether they have provided an effective remedy to ensure the rights of access to justice, knowledge of the truth of the facts and reparation to the next of kin (IACHR Ximenes López v. Brazil, 2006; Balderón García v. Peru, 2006; Guachalá Chimbo v. Ecuador, 2021).

It should be clarified that the duty in question is an obligation of means and not of result, which must be assumed by the state as its legal duty and not as a mere formality atoned in advance to be fruitless or mere management of private interests that depends on the procedural initiative of the victims, their relatives or the private contribution of evidentiary elements. In light of such behavior, once the state authorities know the fact, they must initiate ex officio and without delay a serious, impartial, and effective investigation. Such an investigation must be carried out by all available legal means and be oriented towards the determination of the truth (IACHR Pueblo Bello Massacre v. Colombia, 2006).As part of the obligations that the IACHR usually imposes on states, not only does it establish that governments must investigate and prosecute, but it has also set standards to ensure that such prosecution measures do not involve mere formal commitments or simulate apparent judicial proceedings to satisfy the state's duty to substantiate a judicial process. Hence, in several cases, the Court of San José has

ordered measures to substantiate judicial proceedings that guarantee a real truth or that exhibit a “fraudulent” purpose.

To establish a criterion on the scope of adequate investigations and due process, the IACHR has also refined standards on the reasonable length of a judicial proceeding. About the duration of criminal investigations and prosecutions, the IACHR has said:

“(...) three elements must be taken into account to determine the reasonableness of the period in which a process takes place: a) complexity of the matter, b) procedural activity of the interested party, and c) conduct of the judicial authorities”.

It has also been pointed out that the computation of the period begins with the first procedural act directed against a certain person as the probable perpetrator of a crime and ends when a final and definitive sentence is issued; the computation of the time includes the appeals of instance (IACHR Acosta Calderón v. Ecuador, 2005; Baldeón García v. Peru, 2006). The Court has also established that “[t]he reasonableness of the time limit must be assessed with the total duration of the criminal proceeding” (IACHR Ximenes López v. Brazil, 2006).

In some cases, related to extrajudicial executions and attacks on personal integrity, the regional Court considered that:

“(...) the courts of justice acted without independence and impartiality, applying legal norms or provisions contrary to due

process or omitting to apply those that corresponded" (IACHR Carpio Nicolle et al. v. Guatemala, 2004).
In addition, it also determined that:
"(...) there was continuous obstruction of the investigations by agents of the state and the so-called "parallel groups" in power, as well as a lack of diligence in the development of the investigations, which [determined the] total impunity", the lack of "guarantees necessary to investigate and evaluate each evidentiary material" and that the general situation prevailing in the justice system [...] denounced its impunity […] denot[ed] its powerlessness to maintain its independence and impartiality in the face of the pressures to which its members could be subjected. The Inter-American judges referred to the "fraudulent res judicata" taking into account that it was demonstrated that the systematic obstruction of the administration of justice and due process prevented the identification, prosecution, and punishment of those materially and intellectually responsible for the execution of the victims (IACHR Gutiérrez Soler v. Colombia, 2005).

Satisfaction measures

Adequate comprehensive reparation is no longer considered a matter that covers only monetary aspects. Victims often turn to

the ISHR in search of moral reparation or recognition that the state violated not only the life or physical integrity of individuals but also caused spiritual or emotional harm. In the evolution of the decisions of the IACHR, one can appreciate how the court gradually considered moral affectations under the heading of human rights violations, especially the most serious and atrocious (associated with crimes against humanity that occurred in the American region in the twentieth century).

In the context of internal armed conflicts, many families lost their loved ones through disappearances or extrajudicial executions and, in the years after the cases were investigated by the states, it has not always been corroborated that the internal authorities take measures to satisfy the request for forgiveness of the victims and their families with apologies or acts that generate social awareness of what happened. Various precedents, such as the saga of the Peruvian cases of the 1990s (IACHR Barrios Altos v. Peru, 2001; La Cantuta v. Peru, 2006) or the various massacres committed in Colombia (IACHR Mapiripán Massacre v. Colombia, 2003) or Guatemala (IACHR Dos Erres Massacre v. Guatemala, 2009), it can be seen that the measures adopted by the IACHR were aimed at implementing responses of satisfaction in terms of which the state requests public apologies or builds monuments in memory of the victims (IACHR González

("Campo Algodonero") vs Mexico, 2009). The Court was ordered a monument be erected to the women who had been victims of gender-based murders so that society would know the context of violence they had suffered and also as a measure to raise awareness about sexual exploitation and the consequences of state's inaction against criminal groups. As mentioned above, the state's public acknowledgment that the acts were the responsibility of its agents makes reconciliation possible and restores to the victims (and their families) the dignity that they saw dissipated. In the opinion of the Inter-American Court, especially in cases of serious human rights violations, state forgiveness should contribute to a commitment to non-repetition as well as to social visibility of the events that occurred and even to raising awareness of state's conduct.

In cases that had important repercussions due to the scope of the judgments, the IACHR considered that the states should provide reparation and satisfaction for the events that occurred, either by naming a street or square after the victim (IACHR Benavides Cevallos vs. Ecuador, 1998) or by naming an educational center for children and adolescents after another of the victims in the case (IACHR Street Children, Villagrán Morales) v. Guatemala, 2001).

On occasions, this saga of decisions by the Inter-American court has not been exempt from debate and criticism, as they have been considered to exceed the scope of jurisdiction that the states granted to the regional court within the framework of the scope of Article 63 of the Convention. The case of the monument in Peru of victims of the state and armed groups called “The Eye that Cries” generated a great national and international public debate on the competencies of an international court to impose monuments that end up generating reactions contrary to the mechanisms of reconciliation and truth that were intended.

The violations suffered by the victims are also of a psychological or emotional nature. For this reason, the IACHR has ordered reparations for the health affections of persons with adequate measures for their personal containment, and if the pronouncement addresses the rights of children and adolescents, the state's commitment must be even greater. Thus, the IACHR has indicated:

“(...) to contribute to the reparation of these damages, the Court establishes the obligation of the state to provide free of charge, through its specialized health institutions, the psychological treatment required by the persons mentioned in the previous paragraph, as well as the medical treatment required by the former inmates injured in the fires, including, inter alia, the

medications and surgical operations that may be necessary" (IACHR Instituto de Reeducación del Menor vs. Paraguay, 2004), or the assistance of medications free of charge (IACHR De La Cruz Flores v. Peru, 2004).

In cases of violations of the rights of indigenous peoples and communities, it should be noted that inter-American judgments are very varied in terms of measures to improve the conditions that led to the violations, particularly in cases of dispossession of their lands. In some judgments it has held:

"(...) in view of the measures of reparation requested by the Commission and the representatives, the dispossession of their territory, the damage caused to it, and the fact that the indigenous peoples have the right to the conservation and protection of their environment and the productive capacity of their territories and natural resources, the Court orders that the fund is allocated with the objectives of (i) developing projects aimed at increasing agricultural or other products in the Community; (ii) improving the Community's infrastructure under its present and future needs; (iii) restoring deforested areas" (IACHR Garífuna Community of Punta Piedra and its members vs. Honduras, 2015).

In other rulings, it has ordered, on the other hand, the creation of reparation funds for community development (IACHR

Aloeboetoe et al. v. Suriname, 1993; Mayagna (Sumo) Awas Tigni Community v. Nicaragua, 2001; Xucuru Indigenous People and its members v. Brazil, 2018) or the execution of land demarcation processes (IACHR Yakye Axa Indigenous Community v. Paraguay, 2005; Sawhoyamaxa Indigenous Community v. Paraguay, 2006; Saramaka People v. Suriname, 2007; Triunfo de la Cruz Garífuna Community and its members v. Honduras, 2015; Kaliña and Lokono Peoples v. Suriname, 2015; Xucuru Indigenous People and its members v. Brazil, 2018), without prejudice to ordering the state to implement infrastructure plans to provide communities with better access to health care, roads or drinking water supply (IACHR Río Negro Massacres v. Guatemala, 2012; Garífuna Community of Punta Piedra and its members v. Honduras, 2015; Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina; 2020; Buzos Miskitos ('Lemoth Morris) v. Honduras, 2021).

Within the new lines of work of the IACHR, a more forceful line of jurisprudence can also be seen in the area of obligations that finds as addressees not only the state but also groups of individuals in business contexts that impact the rights of indigenous communities and other sectors, as well as highlighting the obligation to satisfy the damages caused by such

companies (IACHR Xákmok Kásek Indigenous Community v. Paraguay, 2005; Ximenes Lópes v. Brazil, 2006; Saramaka People v. Suriname, 2007). In some cases, the Inter-American decisions have incorporated references to the United Nations Guiding Principles on Business and Human Rights with the objective of analyzing the contexts of human rights violations of indigenous peoples in business activities (IACHR Pueblos Kaliña and Lokono v. Suriname, 2015; Buzos Miskitos (Lemoth Morris) v. Honduras, 2021), (Salmon, 2012).

As anticipated, armed conflicts and displacement of persons have been analyzed in various proceedings before the IACHR. To respond to these serious violations, the Court of San José has ordered the national authorities to take various measures to ensure compensation for the losses caused. Many of the persons displaced by armed conflict have lost their property, and states have been ordered to guarantee housing plans for these collective victims (IACHR Plan de Sánchez Massacre v. Guatemala, 2004; Pueblo Bello Massacre v. Colombia, 2006; Massacres of El Mozote and nearby places v. El Salvador, 2012) or a return to their lands and homes without further danger to their lives or families (whether the threat comes from state organs themselves or non-state armed groups)(IACHR Mapiripán Massacre v. Colombia, 2005; Pueblo Bello Massacre v. Colombia, 2006;

Ituango Massacres v. Colombia, 2006).

Non-repetition measures

Another of the measures that have had a significant impact on inter-American decisions are those that tend to give a symbolic meaning to reparations because of being understood as a behavior that states should not repeat at the risk of aggravating or encouraging future episodes of human rights violations. One of the activities that the Regional Court has taken into account (throughout its more than 40 years of existence) is to require the domestic authorities to ensure that the events that have occurred are not repeated on an ongoing basis. Indeed, if the violations are the result of conduct or omissions of state organs, they are obliged to prevent, through adequate due diligence, that their transgressions are not repeated.

There are several requests to the states to modify such behaviors, which are usually requests for training on respect for human rights for state officials (mainly police officers, penitentiary agents, and justice personnel, among others) (IACHR González et al. (Campo Algodonero) v. Mexico, 2009). Measures of non-repetition are significant for states to adopt provisions within the framework of their international obligations (Articles 1.1 and 2

of the ACHR and related treaties) to modify state conduct and treatment of the population in general, but especially of vulnerable groups in society.

These measures also have a meaning of commitment in matters concerning indigenous and tribal peoples and communities that have suffered-on repeated occasions-similar violations. In some cases, the IACHR has established as a measure of non-repetition the realization of prior consultations with the communities to avoid the repetition of violations of their rights. It can be illustrated with the sentence in the case "Kichwa Indigenous People of Sarayaku vs. Ecuador", stating:

"(...) the state is responsible for the violation of the right to communal property of the Sarayaku People, for not having adequately guaranteed their right to consultation. Consequently, the Court provides, as a guarantee of non-repetition, that if it is intended to carry out activities or projects of exploration or extraction of natural resources, or investment or development plans of any other kind that involve potential impacts on the Sarayaku territory or essential aspects of their worldview or their cultural life and identity, the Sarayaku People must be previously, adequately and effectively consulted, in full compliance with international standards applicable to the matter" (IACHR Kichwa Indigenous People of Sarayaku v. Ecuador, 2012).

In other precedents, it has ordered measures where by the state must refrain from taking any further measures that violate the rights of the communities. (IACHR Moiwana Community v. Suriname, 2005). In its case, the Court emphasized:

“(...) until the property rights of the members of the community over their traditional territories are secured, the state must refrain from actions-whether by state agents or third parties acting with the acquiescence or tolerance of the state-that affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the community traditionally lived”.

In the event of violations involving violations of women's rights, the IACHR has deployed various methods to redress them and ensure that measures are adopted internally to prevent their repetition. Thus, in the case of sexual violence perpetrated by public officials, it was noted:

“(...) [the IACHR] values positively the existence of various actions and training courses developed by the state. In this regard, it considers that they should include, as appropriate, the study of the provisions of the Istanbul Protocol and the Guidelines of the World Health Organization, and should emphasize the care of alleged victims of rape, particularly when they belong to groups in a situation of greater vulnerability such

as indigenous women" (IACHR Fernández Ortega v. Mexico, 2010; Women Victims of Sexual Torture in Atenco v. Mexico, 2018).

In Atenco case, the IACHR ordering the state to create and implement, within two years, a training plan for officers of the Federal Police and the state of Mexico aimed at: (i) sensitize the members of the police forces in approaching police operations with a gender perspective, the discriminatory nature of gender stereotypes such as those employed in this case and the absolute duty to respect and protect the civilian population with whom they come into contact in the framework of their law enforcement work, as well as to (ii) train police officers on the standards regarding the use of force in contexts of social protest established in this judgment and in the jurisprudence of this Court. This training plan should be incorporated into the regular training course of the members of the federal and state police force.

It has also ordered the continuity of assistance programs and training on sexual violence, but with the deployment of a committed gender perspective that does not revictimize women (IACHR Rosendo Cantú v. Mexico, 2010; Véliz Franco v. Guatemala, 2014; Velásquez Paiz v. Guatemala, 2015; Favela Nova Brasília v. Brazil, 2017). Furthermore, it is added that the

aforementioned policies should not be formal or in temporary periods that do not bring about genuine changes in the perceptions of public agents.

Precisely, the Court of San José has reiterated this point:

“(...) training, as a continuous training system, must be extended for a significant period to fulfill its objectives. Likewise, and in light of the jurisprudence of this Court, it warns that training with a gender perspective implies not only learning the rules but must generate that all officials recognize the existence of discrimination against women and the effects that stereotypical ideas and evaluations generate in women concerning the scope and content of human right”. (IACHR Espinoza Gonzales v. Peru, 2014).

More recently, it has also obliged the state to generate a series of actions to prevent women human rights defenders and journalists from being threatened or losing their lives in the defense of women's rights.

Special consideration should be given to the events of violence against girls and adolescents since the IACHR has stated that state's care and policies of non-repetition are a maximum commitment that the states must apply based on the impact on the progressive maturity process of the victims (IACHR V.R.P., V.R.P.C. v. Nicaragua, 2018). Indeed, it is well known that -in

cases of women victims of gender violence- the harm that can be caused by inadequate mechanisms of containment and investigation further aggravates the circumstances of vulnerability.

From this point of view, the most recent inter-American jurisprudence has promoted that the:

"(...) State adopt protocols that establish clear protection measures and criteria to be taken into account during investigations and criminal proceedings derived from acts of sexual violence to the detriment of children and adolescents.) The state should adopt protocols that establish clear protection measures and criteria to be taken into account during investigations and criminal proceedings arising from acts of sexual violence to the detriment of children and adolescents; that ensure that statements and interviews, medical-forensic examinations-, as well as psychological and/or psychiatric expertise is carried out in a manner tailored to the needs of the child and adolescent victims, and delimit the content of specialized comprehensive care for the child and adolescent victims of sexual violence" (IACHR V.R.P., V.P.C. et al. v. Nicaragua, 2018).

It's not could it be overlooked that the violations that often occur in the context of the actions of state security officials have led the

IACHR to emphasize:
“(...) the power, and even the obligation of the state to “guarantee (the) security and maintain public order”. However, state's power in this area is not unlimited; its actions are conditioned by respect for the fundamental rights of individuals under its jurisdiction and the observance of procedures under the law” (IACHR Bulacio v. Argentina, 2003).
Moreover, in addressing various aspects of the exercise of civil and political rights, the IACHR has established guidelines for non-repetition that have been key to legislative changes in the region. Thus, concerning the right to be elected in democratic elections and the scope of the right to indefinite reelection (IACHR Yatama v. Nicaragua, 2005; Castañeda Gutman v. Mexico, 2008; Advisory Opinion OC-28/21, The concept of indefinite presidential reelection in presidential systems in the context of the Inter-American System of Human Rights, 2021), equal access to assisted reproduction techniques (IACHR Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica, 2012), etc. In sum, in the Latin American context, the San José Court, through the adoption of measures of non-repetition, in addition to reparations in integrum, achieves a preventive and emblematic effect in the sense of taking advantage of the fragment of cases that effectively reach its forum so that the judgment has an

impact beyond the specific case (Von Bogdandy, 2019).

Measures to adjust internal standards

However, it is important to keep in mind that many of the human rights violations that are known in the ISHR correspond to situations that have their origin in existing norms that are contrary to inter-American standards and whose application has been violated over time. Sometimes they are simple regulatory norms, on other occasions norms of regional or national application, and even the IACHR has resolved cases in which the collision between the standards of a right or the lack of its provision in the political constitution of a state has been considered contrary to the mandate of the ACHR.

It has also been possible to learn of cases of regulatory regimes that prevented the investigation of serious human rights violations (mainly due to events that occurred during the various dictatorial governments of a civil-military nature in the last decades of the twentieth century in Latin America). The various cases on the legality of amnesty provisions and laws that prevented the investigation and prosecution of systematic human rights violations can be mentioned here. The Court of San José has considered that such regulations are harmful to the standards

of the ACHR and has even warned that such impediments were already provided for as norms of jus cogens (IACHR Barrios Altos v. Peru, 2001; Gelman v. Uruguay, 2011; Gaja, 1981) before the existence and entry into force of the Convention itself. Therefore, one way to repair the damages suffered by the victims and their families is to remove the obstacles that prevent the investigation, prosecution, and eventual conviction of those responsible.

This saga of IACHR decisions has not been free from reproach either, especially when it is argued that amnesty laws were intended to achieve "national reconciliation", or that they did not arise from the aspirations of authoritarian governments seeking impunity for their acts (as happened in some Central American cases or the most resounding cases in Peru- Barrios Altos, La Cantura, Castro Castro Prision) but, on the contrary, from legislative decisions emanating from democratically elected parliaments (as in the case of Gelman v Uruguay). Also in this line of argument, inter-American jurisprudence has considered cases of violations that, despite not being expressly provided for in the text of the ACHR, are subject to the practice of a conventional interpretation under the Convention (supported not only by the Convention itself but also by other international instruments), all in light of the rules of interpretation contained in

super-article 29 of the ACHR (Sola, 2019). In this way, the application of standards derived from international criminal law has been encouraged (especially when it has undergone great development in recent decades).

In cases of serious human rights violations, the San José Court analyzed the scope of "crimes against humanity" to consider that the events that took place in the states of the region constituted more than isolated acts of murder, kidnapping, or disappearance of persons. These decisions were also relevant in forcing national bodies to adapt their domestic norms (e.g., by creating clearer criminal offenses and even including crimes against humanity in their criminal legislation) to prevent the crimes from recurring in the future. It should be recalled that the obligations of states to adopt measures to bring their international commitments into line with the canon of norms and interpretations of the ACHR (and other binding American human rights instruments), constrains states to remove any normative obstacle that impedes respect for the human rights of their inhabitants.

These obligations (foreseen since the first judgment of the IACHR) have led the regional human rights court to generate new definitions of the obligations of state organs to adapt to the interpretative guidelines established by its jurisprudence in pursuit of the guarantee of the rights recognized therein. Thus,

for example, the Court of San José has developed a hermeneutic process that was initially based on the commitment to respect human rights treaties to validate the useful effect (IACHR Trabajadores Cesados del Congreso (Aguado Alfaro) v. Peru, 2006; Heliodoro Portugal v. Panama, 2008; Radilla Pacheco v. Mexico, 2009; Fernández Ortega et al. v. Mexico, 2010; Rosendo Cantú et al. vs. Mexico, 2010; Liakat Ali Alibux vs. Suriname, 2014) of their application, taking a more contemporary step in light of the doctrine of conventionality control (García Ramírez, 2020). Indeed, through a series of judgments and advisory opinions, the IACHR has established the attribution and duty (initially destined to the judicial organs and/or linked to the administration of justice) to informally carry out an examination of the adequacy of national norms and acts to the guidelines of the ACHR and the interpretations of the IACHR itself (Almonacid Arellano v. Chile, 2006) (although it should be noted that later the other organs and state powers have been summoned).

The Court indicated that domestic judges and courts are subject to the rule of law and, therefore, are obliged to apply the provisions in force in the legal system. But when a state has ratified an international treaty such as the American Convention, its judges, as part of the state apparatus, are also subject to it,

which obliges them to ensure that the effects of the provisions of the Convention are not diminished by the application of laws contrary to its object and purpose, and which from the outset lack legal effect. In other words, the Judiciary must exercise a kind of "conventionality control" between the domestic legal norms that apply in specific cases and the American Convention on Human Rights. In this task, the Judiciary must take into account not only the treaty, but also the interpretation made by the Inter-American Court, the ultimate interpreter of the American Convention. Therefore, it is appropriate to emphasize what the IACHR recently stated in this regard:

"(...) all authorities of a state party to the Convention should exercise a "conventionality control" between acts or omissions and domestic norms and the American Convention, so that the interpretation and application of domestic law are consistent with the state's international human rights obligations. This control of conventionality must be carried out within the framework of their respective competencies and the corresponding procedural regulations, and in this task, taking into account not only the treaty but also the interpretation of the same by the Inter-American Court, the ultimate interpreter of the American Convention" (IACHR Colindres Schonenberg v. El Salvador, 2019; Olivares Muñoz et al. v. Venezuela, 2020).

Under these conditions, the focus on measures to bring domestic legislation into line with international obligations has had a considerable impact on the purpose of calibrating the various criminal and criminal procedure systems in the region, which were (and still are) subject to considerable practices that were harmful to human rights and, therefore, in dissonance with the mandates (normative and jurisprudential) of the ISHR.

In numerous precedents, for example, the IACHR has stated that the state:

"(...) must adapt, within a reasonable period of time, its domestic legislation to the American Convention, such that it) must adapt, within a reasonable period of time, its domestic legislation to the American Convention, in such a way that a) it adequately incorporates the international standards on the use of force by law enforcement officials, said standards must contain the specifications indicated in paragraph 75 of this Judgment; b) it puts into operation a penitentiary surveillance body that is eminently civilian in nature; c) guarantees an effective procedure or mechanism, before a competent, impartial and independent body, for the verification and investigation of complaints filed by persons deprived of liberty regarding human rights violations, in particular regarding the legality of the use of lethal force exercised by state agents; d) guarantees that investigations into

acts constituting human rights violations are carried out by ordinary prosecutors and judges" (IACHR Montero Aranguren and others (Retén de Catia) v. Venezuela, 2006).

On some of these points, it could also be mentioned the reiterations of this trend of argumentation when pointing out the minimum standards that must be observed in the process of detention and search of a person in a police procedure (IACHR Fernández Prieto and Tumbeiro v. Argentina, 2020); in the same sense concerning the right to appeal judgments (IACHR Barreto Leiva v. Venezuela, 2009; Valle Ambrosio et al. v. Argentina, 2020), or when insisting on the improvement-based on international standards-of conditions of detention of persons deprived of liberty in dignified spaces (IACHR Instituto de Reeducación del Menor vs. Paraguay, 2004; Caesar v. Trinidad and Tobago, 2005; Vélez Loor v. Panamá, 2010; Mendoza et al. v. Argentina, 2013). On this last aspect, the IACHR has specified a range of minimum standards for detention conditions to ensure: a) a space large enough to spend the night; b) ventilated cells with access to natural light; c) access to clean toilets and showers with sufficient privacy; d) adequate, timely and sufficient food and health care, and e) access to educational, labor and any other measures essential for the reform and social readaptation of inmates.

Finally, it should not be forgotten that in other cases -the IACHR has ordered states to adjust national norms with the rights of migrants to be treated with dignity, especially when they are in situations of irregular migration (IACHR Vélez Loor vs. Panamá, 2010; Nadege Dorzema v. Dominican Republic, 2012; Familia Pacheco Tineo v. Plurinational State of Bolivia, 2013; Dominican and Haitian expelled persons vs. Dominican Republic, 2014). Such measures and the notes of their evolution reveal -in the end, one of the areas in which the process of inter-Americanization in human rights of national orders takes shape through the interaction of the IACHR and domestic authorities; they even stand as an authentic example of how the interactive mechanism advances towards a common body of standards for the safeguarding of rights, democracy and the rule of law and strengthens the paradigm of transforming constitutionalism in the region (Morales Antoniazzi, 2019).

Some final thoughts

The description of the central features of the reparations regime as the ultimate goal of the ISHR's contentious procedure (Acosta Alvarado, 2013) can hardly be isolated not only from the vigorous presence of international law in the integration of what

Sergio García Ramírez has labeled as the contemporary status of the human being. The author indicated that the jurisprudence of the IACHR on reparations constitutes one of its relevant contributions (in his opinion, the most important) to the formation of international human rights law and serves as an example of the way in which it has provided an eminent service to regional human rights law since its establishment in 1979, first through advisory opinions and then through judgments in specific cases (García Ramírez, 2009); but also from the activist role from which the San José Tribunal has designed and implemented a wide range of reparations (Huneeus, 2011).

Certainly in its work after more than 40 years of existence, the IACHR has built a consistent jurisprudence in its endeavor to establish basic standards concerning the obligations in which states sovereignly assume the commitment to provide adequate and comprehensive reparations to the victims of human rights violations that have occurred in their jurisdictions. This result, in part, is also a reflection of the evolution of the functioning of the IACHR itself in receiving the experiences and claims narrated by the victims in their written submissions and presented in the hearings before the San José courts. Indeed, giving a human face to the victims' (and their relatives') claims and, at the same time, understanding their suffering, are some of the reasons why the

IACHR increasingly extended not only economic reparations but also built a very broad jurisprudence on non-pecuniary reparations.

Among the cardinal contributions of Inter-American judicial law to the chapter on reparations are: i) the preventive function of the damage through guarantees of non-repetition; ii) the revaluation of non-monetary measures of rehabilitation, satisfaction, etc.; iii) the open acceptance of collective non-pecuniary damage; iv) the insistence on the need for effectiveness of compensatory judgments-in order not to be relegated to mere declarations-; etc (Kemelmajer de Carlucci, 2020).

The attraction of this whole jurisprudential movement is to understand that through the different types of reparations that the IACHR has sponsored thus far (identified and analyzed throughout this work), a set of standards is constructed that states are obliged to implement. This is not only because the cases processed by the IACHR have so indicated, but also because it is understood that they entail obligations to adapt their domestic legislation in light of the expansive effect of the judgments (and of the advisory opinions as well) rendered in the framework of the conventionality control to which all organs of the states parties to the ACHR and other binding treaties of the region are summoned.

The role of the IACHR in providing reparations to victims of serious human rights violations should be duly appreciated if one considers that the American region has experienced armed violence in recent decades and does not lose sight of the fact that there are still commitments by states to mitigate the effects on the inhabitants of urban or rural areas due to the new scourges of violence perpetrated by armed criminal or paramilitary groups.

It should also be noted that the scope of inter-American jurisprudence on reparations implies that national bodies can also adapt the criteria established therein to optimize the criteria for interpreting their domestic norms and, based on this exegetical practice, contribute to the desideratum of the full and effective enjoyment of human rights. At the end of the day, this aspect is nothing more than a derivative of its most deeply rooted commitment to comply with and execute the pronouncements of the Court of San José in such a way that the economic and non-pecuniary reparations that the victims deserve for the damages caused by the organs of the state or other subjects concerning which it must ensure that they do not incur in human rights violations become a reality.

In the final analysis, the current pace at which the scheme of reparations for victims of human rights violations (and their families) has gained momentum in the IAHRS is evidence, in

addition to the crucial character, it reveals as an essential step-, if not aimed at remedying any consequences-so that the victims can move forward with their life projects, that it is correct to suggest that the analysis of the behavior of the states concerning the reparations ordered by the international body also offers-a true examination of the good faith of states: inter-American decisions on reparations test the good faith compliance of state obligations (Salvioli, 2020) (and even measure it at its very limits).

References

Abreu Burelli, A. (2005). La jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de reparaciones. In *La Corte Interamericana de Derechos Humanos: Un cuarto de siglo: 1979-2004.* San José, Costa Rica: Inter-American Court of Human Rights. 145: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuarto-siglo.pdf

Acosta Alvarado, A. (2013). *Apuntes sobre el sistema interamericano. Universidad de Externado.* Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Bogotá, Vol IV, 103.

Ago, R. (1977). Sixth Report on State Responsibility (Doc. A/CN.4/302 and Add. *ILC Yearbook, Vol. II,* 11.

An-Naim, A. (2003). Toward a Universal Doctrine of Reparation for Violations of International Human Rights and Humanitarian Law. *International Law Forum du Droit International. No. 5,* 27ss.

Antkowiak, T. (2012). La Corte Interamericana de Derechos Humanos y sus reparaciones centradas en la víctima. In H. Olàsolo, S. Cuenca (Eds.). *Perspectiva Iberoamericana Sobre La Justicia Penal Internacional.* Valencia: Tirant Lo Blanch, 307-318.

Ayala Corao, C. (2020). Modalidades de reparaciones en el sistema interamericano de derechos humanos. In V. Bazán (Dir.) *Vulneraciones a los derechos humanos.* Astrea, Buenos Aires, 349-350.

Badillo, A., Muñoz, L. (2018). La necesidad de repensar el criterio de la reparación en el marco de la justicia especial para la paz. In L. Cucarella (Ed.). *Convencionalidad, nuevos derechos y grupos vulnerables.* Bogotá: Ediciones Nueva Jurídica, 290-295.

Bassioni, CH. (1998). Searching for Peace Achieving Justice: The Need for Accountability, *Nouvelles Études Pénales, Vol. 14,* 399ss.

Buxbaum, R.A. (2005). Legal History of International Reparations. *Berkeley Journal of International Law, 23 (2),* 314.

Caballero Ochoa, J., García Huerta, D., Arjona Estévez, J.R. (2020). Reparaciones transformadoras en materia de género: ¿buenas intenciones o práctica plausible. In V. Bazán. (Dir.) *Vulneraciones a los Derechos Humanos.* Edit. Astrea, 401ss.

Calderón Gamboa, J. (2013). La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano. In E. Ferrer Mac-Gregor., J, Caballero Ochoa, Ch. Steiner (Coords). *Derechos humanos en la Constitución: Comentarios de jurisprudencia constitucional e interamericana.* T.1. Suprema

Corte de Justicia de la Nación-UNAM-Fundación Konrad Adenauer, México. 145-219: https://www.corteidh.or.cr/tablas/r33008.pdf

Camarillo Govea, L. A. (2018). *Acceso directo del individuo ante la Corte Interamericana de Derechos Humanos.* Tirant lo Blanch, Mexico.

Cançado Trindade, A. (2003). Las cláusulas pétreas de la protección internacional del ser humano: El acceso directo de los individuos a la justicia a nivel internacional y la intangibilidad de la jurisdicción obligatoria de los tribunales internacionales de derechos humanos. In AA. VV. *El Sistema Interamericano de Protección de los Derechos Humanos en el umbral del siglo XXI.* Corte IDH. San José. 4-60: http://ru.juridicas.unam.mx/xmlui/handle/123456789/28019

Cançado Trindade, A. (2006). Responsabilidad, perdón y justicia como manifestaciones de la conciencia jurídica universal. *Revista Estudios Socio-Jurídicos, n. º 8-1.* 29ss.

Cançado Trindade, A. (2007). *El Derecho Internacional de los Derechos Humanos. Esencia y trascendencia.* Edit. Porrúa, Mexico.

Cançado Trindade, A. (2010). Reminiscencias de la Corte Interamericana de Derechos Humanos en cuanto a su jurisprudencia en materia de reparaciones. In A. Von Bogdandy,

E. Ferrer Mac Gregor., M. Morales Antoniazi (Coords). *La justicia constitucional y su internalización Hacia un Ius Constitutionale Commune en América Latina?* T. II. UNAM Max-Planck Institute, 189: https://biblioteca.corteidh.or.cr/documento/62694

Cançado Trindade, A. (2013). *Los tribunales internacionales contemporáneos y la humanización del Derecho internacional.* Edit. AdHoc-, Buenos Aires.

Carbonell, M., Caballero González, E. (2016). *Convención Americana de Derechos Humanos. Comentada.* Tirant Lo Blanch, México.

Cejil (2006). *The Urgent Need for a Legal Aid Fund in the Inter-American System for the Promotion and Protection of Human Rights.* Washington: https://cejil.org/wp-content/uploads/pdfs/position_paper_4_0.pdf

Crawford, J. (2014). *The ILC Articles on International State Responsibility. Introduction, text and commentary.* Dykinson, Spain.

Danieli, Y. (1998). Justice and Reparations: Steps in the Healing Process. *Nouvelles Études Pénales, 14,* 303.

Diez de Velasco, M. (2005). *Instituciones de Derecho Internacional Público*. 15th Edition, Tecnos, Madrid, 812.

Drnas, Z. (2005). ¿Se ha convertido la Corte Interamericana de Derechos Humanos en la cuarta instancia?. *In XVII Reunión conjunta de Academias Nacionales de Derecho y Ciencias Sociales de Argentina.* La Ley Edit., Buenos Aires, 95-158.

Drnas, Z. (2009). *Las reparaciones en el derecho internacional de los derechos humanos.* Doctrine Section, National Academy of Law and Social Sciences of Córdoba: https://www.acaderc.org.ar/2009/12/15/las-reparaciones-en-el-derecho-internacional-de-los-derechos-humanos/

Espejo Yaksik, N., Leiva García, C. (2012). *Digesto de Jurisprudencia de la Corte Interamericana de Derechos Humanos. (1984-2012).* Thomson Reuters-Abeledo Perrot, Chile.

Falk, R. (2006). *Reparations, International Law, and Global Justice: A New Frontier. The Handbook of Reparations.* Pablo De Greiff (Ed). Tecnos, Alicante.

Faundez Ledesma, H. (2004). *El Sistema Interamericano de protección de los derechos humanos: aspectos institucionales y procesales. Instituto Interamericano de Derechosa Humanos.* Costa Rica, 833: https://www.iidh.ed.cr/IIDH/media/1575si_proteccion_ddhh_3e.pdf

Ferrer Lloret, J. (1998). *Responsabilidad Internacional del Estado y Derechos Humanos.* Tecnos, Alicante. 26.

Gaja, G. (1981). *Ius Cogens Beyond the Vienna Convention.* Collected Courses of The Hague Academy of International Law, n.° 172, III. ed. Brill, Bruxelles, 271-316.

García Ramírez, S. (2003). *Reparaciones en el Sistema Interamericano de Derechos Humanos. El Sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI.* T.I, 2° Edic. Inter-American Court of Human Rights. Costa Rica. 139ss.

García Ramírez, S. (2019). *La Corte Interamericana de Derechos Humanos.* Edit. Porrúa, Mexico.

García Ramírez, S. (2020). *América. In V. Bazán (Dir) Vulneraciones a los derechos humanos.* Astrea, Buenos Aires, 304.

Gialdino, R. (2013). *Derecho Internacional de los Derechos Humanos. Principios, Fuentes, Interpretaciones y Obligaciones.* Abeledo Perrot, Buenos Aires.

Grossman, C., Del Campo, A., Trudeau, M. (2018). *International Law and Reparations. The Inter-American System.* Clarity Press, London.

Herencia Carrasco, S. (2011). Las reparaciones en la jurisprudencia de la Corte Interamericana de Derechos Humanos. In K. Ambos, E, Malarino, G. Elsner (Edit). *Sistema interamericano de protección de los derechos humanos y derecho*

penal internacional. t. 2, Grupo Latinoamericano de Estudios sobre Derecho Penal Internacional, Konrad Adenauer-Stiftung Montevideo, 381-402: https://archivos.juridicas.unam.mx/www/bjv/libros/8/3801/17.pdf

Huneeus, A. (2011). Courts Resisting Courts: Lessons from the Inter- American Court's Struggle to Enforce Human Rights. *Cornell International Law Journal, 44,* 501ss.

IACHR. (2021). Medidas de Reparación. Cuadernillos de Jurisprudencia de la Corte Interamericana de Derechos Humanos n.° 32, *Corte IDH, San José:* https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo32.pdf

IACRH. *Rules of Procedure of the Inter-American Court of Human Rights,* 1980 with amendments in 1991, 1996, 2000, 2003 and 2009.

ICC. (2005). *Regulations of the Trust Fund for Victims.* Resolution ICC-ASP/4/Res.3. Adopted on 3 December.

Kawabata, A. (1997). Reparación de las violaciones de Derechos Humanos en el marco de la Convención Americana de Derechos Humanos. In M. Abregú, Ch. Courtis (Comp). *La aplicación de los tratados sobre derechos humanos por los tribunales locales.* Edit. Del Puerto-CELS. Buenos Aires, 365ss.

Kleffner, J. K. (2003). The Impact of Complementarity on National Implementation of Substantive International Criminal Law. *Journal of International Criminal Justice, 1 (1)* 86-113

López Zamora, L. (2007). Algunas reflexiones en torno a la reparación por satisfacción ante violaciones de normas de protección de derechos humanos y su relación con la teoría general de la responsabilidad internacional del Estado. *American University International Law, 23,* 165ss.

Medina Quiroga, C. (2011). Modificación de los reglamentos de la Corte IDH y de la Comisión IDH al procedimiento de peticiones individuales ante la Corte. *Anuario del Centro de Derechos Humanos. Universidad de Chile. Santiago.* 119Ss: https://anuariocdh.uchile.cl/index.php/ADH/article/view/17001

Mimow, M. (1999). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence.* Beacon Press. 224.

Moore, J.B. (1898). *History and Digest of the International Arbitrations to which the United States Has Been a Party,* Vol. III, Washington. 3127.

Morales Antoniazzi, M. (2019). Interamericanización. Fundamentos e impactos. In A. Von Bogdandy., E. Ferrer Mac Gregor; M. Morales Antoniazzi; P. Saavedra Alessandri. (Coords.). *Cumplimiento e Impacto de las sentencias de la Corte*

Interamericana y el Tribunal Europeo de Derechos Humanos. Transformando realidades. Max Planck Institute for Comparative Public Law and Public International Law Instituto de Estudios Constitucionales del Estado de Querétaro-UNAM, Mexico, 88: https://archivos.juridicas.unam.mx/www/bjv/libros/13/6273/5.pdf

Nash Rojas, C. (2005). *El sistema interamericano de derechos humanos y el desafío de reparar las violaciones de estos derechos. Jornadas de Derecho internacional (29 de noviembre al 2 de diciembre de 2004).* Sociedad Chilena de Derecho Internacional. Santiago de Chile-Washington: Organization of American States- General Secretariat, 323ss.

Nash Rojas, C. (2009). *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988-2007).* Edit. Universidad de Chile, Santiago.

Nogueira Alcalá, H. (2012). El uso del Derecho convencional internacional de los derechos humanos en la jurisprudencia del Tribunal Constitucional chileno en el período 2006-2010. *Revista Chilena de Derecho, 39 (1),* 149-187.

Noor Muhammad, H. N. A. (1981). Due Process of Law for Persons Accused of Crime. In L. Henkin (ed.) *The International Bill of Rights. The Covenant on Civil and Political Rights.* Columbia University Press, New York.

OEA (2008). *Legal Assistance Fund of the Inter-American Human Rights System*. OAS-AG/RES. 2426 (XXXVIII-O/2008): https://www.oas.org/dil/esp/resoluciones_asamblea_general_38_periodo_sesiones_colombia_junio_2008.htm

OEA (2011). *Compilation of the recommendations of civil society organizations on the topics of the working group*. November 21. OEA/Ser.G-GT/SIDH-11/11 rev. 1: http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%202010%20P%20ENG.pdf

OAS General Assembly, Resolutions: AG/RES. 2175 (XXXVI-O/06) of June 6, 2006, AG/RES. 2267 (XXXVII-O/07) of June 5, 2007; AG/RES. 2406 (XXXVIII-O/08) of June 3, 2008; AG/RES. 2509 (XXXIX-O/09) of June 4, 2009, and AG/RES. 2595 (XL-O/10) of July 12, 2010 and the report of the independent expert to update the Set of Principles to Combat Impunity (E/CN.4/2005/102) of 18 February 2005: https://www.oas.org/en/council/AG/

ACHR. (1969). Organization of American States: https://www.oas.org/dil/esp/tratados_b32_convencion_americana_sobre_derechos_humanos.htm

Parra Vera, O. (2012). La jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates. *Revista Jurídica de la Universidad de*

Palermo, 13, nº1, 551ss.
Pasqualucci, J.M. (1996). Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure. *Michigan Journal of International Law, 18 (1),*1-58.
Perez-Leon Acevedo, J. P. (2008). Reparaciones en Derecho Internacional de Derechos Humanos, Derecho Internacional Humanitario y Derecho Penal Internacional. *American University International Law Review. 23 (1),* 8.
Piovesan, F. (2017). Direitos humanos e diálogo entre jurisdições, In L. Arcaro Conci, L. Mezzetti. (Eds.) *Diálogo entre Cortes.* Universidad de Externado, Bogotá, 79ss.
Pisillo Mazzeschi, R. (2003). Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview. *Journal of International Criminal Justice, 1,* 339ss.
Remiro Brotons, A. (1997). *Derecho Internacional.* Mac. Graw-Hill. 23.
Rey, S. (2012). La justificación del deber de investigar y sancionar graves violaciones a los derechos humanos. *Revista Derechos Humanos. Reflexiones desde el Sur, Ministerio de Justicia y Derechos Humanos de la Nación.* 147.
Rodríguez Pinzón, D. (2007). Reparations of the Inter-American Human Rights System in Cases of Gross and Systemic Violations

of Human Rights: The Colombian Case. *American University Law Review, 56, (6),* 1390-1395.

Rojas Báez, J. (2008). La jurisprudencia de la Corte Interamericana de Derecho Humanos en materia de reparaciones y los criterios del Proyecto de Artículos sobre Responsabilidad del Estado por Hechos Internacionalmente Ilícitos. *American University, International Law Review, 23.* 100ss.

Rousset Siri, A. (2011). El concepto de reparación integral en la jurisprudencia de la Corte Interamericana. *Revista Internacional del Derechos Humanos. N.º 1,* 59-79.

Saavedra Alessandri, P. (2005). Algunas consideraciones sobre la jurisprudencia en las reparaciones de la Corte Interamericana de Derechos Humanos; In R. Zeribi Ribeiro. *Rumbos del Derecho Internacional de los Derechos Humanos: estudios en homenaje al profesor Antônio Augusto Cançado Trindade.* Edit. Fabris, Porto Alegre, 98.

Salado Osuna, A. (2005). La responsabilidad internacional del Estado por violaciones de derechos humanos: la obligación de reparar en los sistemas regionales de protección. In M. Vargas Gómez-Urrutia, A. Salinas de Frías. *Soberanía del Estado y Derecho Internacional. Homenaje al Profesor Juan Antonio Carrillo Salcedo.* Ed. Universidades de Sevilla, Córdoba-Málaga, 1251-1271.

Salomon, E. (2011). *Jurisprudencia de la Corte Interamericana de Derechos Humanos.* Edit. Universidad del Rosario.

Salmon, E. (2012). Mecanismos de reparación en el ámbito del Sistema Interamericano por violaciones de derechos humanos cometidas por empresas multinacionales: La responsabilidad del Estado y la construcción de medidas de reparación. *Revista de Estudios Jurídicos nº 12/2012 (Segunda Época), Universidad de Jaén.*

Salvioli, F. (1995). *Algunas reflexiones sobre la indemnización en las Sentencias de la Corte Interamericana de Derechos Humanos*. Basic Studies on Human Rights. Volume III. Inter-American Institute of Human Rights, Costa Rica, 160ss

Salvioli, F. (2010). Las sentencias de la Corte Interamericana de Derechos Humanos en materia de reparaciones. In P. Manili (Direc), *Tratado de Derecho Procesal Constitucional argentino, comparado y transnacional.* Tomo III, La Ley. Buenos Aires. (pp. 819-852).

Salvioli, F. (2019). Report "Promotion of truth, justice, reparations and guarantees of non-repetition" by the United Nations Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Repetition. Human Rights Council. Forty-second session, 9-27 September 2019. A/HRC/42/45. https://documents-dds

Salvioli, F. (2020). *El Sistema Interamericano de Protección de los Derechos Humanos: Instrumentos, órganos, procedimientos y jurisprudencia.* Instituto de Estudios Constitucionales del Estado de Querétaro, México. 260.

Santiago, A., Bellocchio, L. (2018). *Historia de la Corte Interamericana de Derechos Humanos. (1978-2018).* Edit. La Ley, Buenos Aires.

Schneider, J. (2015). *Reparation and Enforcement of Judgments: A Comparative Analysis of the European and Inter-American Human Rights Systems.* Berlin: e-pub, GmbH.

Shaw, M. (2003). I*nternational Law*. Cambridge University Press, Cambridge, 5th ed, 117ss.

Shelton, D. (1999). *Remedies in International Human Rights Law.* Oxford University Press. Oxford, 37ss.

Shelton, D. (2004). Reparations in the Inter-American System. In D. Harris, S. Livingstone (ed). *The Inter-American System of Human Rights.* Oxford University Press, New York, 151-172.

Solá, V. (2019). Los silencios en la Convención Americana sobre Derechos Humanos: ¿un juego de matriohskas? *Revista de Derecho Público, n.° 7, Universidad Católica de Córdoba.* 56-126.

Sommer, Ch. (2014). Las reformas a los sistemas de protección de derechos humanos americano y europeo: avances y

claroscuros. In D. Pavón Piscitello. *Derecho Internacional de los Derechos Humanos: Manifestaciones, violaciones y respuestas actuales.* EDUCC, 59-97.

Steiner, Ch., Uribe, P. (2014). *Convención Americana sobre Derechos Humanos (Comentada).* Konrad Adenauer Stiftung-Eudeba, Buenos Aires: https://www.corteidh.or.cr/tablas/30237.pdf

Tomuschat, CH. (2002). Reparations for Victims of Grave Human Rights Violations. *Tulane Journal of International and Comparative Law, 10,* 157ss.

United Nations General Assembly (2001). *Responsibility of States for Internationally Wrongful Acts, 85th Plenary Session*, 12 December 2001, A/RES/56/83.

UNHCHR. (2006). *Report of the Office of the United Nations High Commissioner for Human Rights. Study on the Right to the Truth,* U.N. Doc. E/CN.4/2006/91 of January 9.

Ventura Robles, M. (2012). La Jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de reparaciones. In L. Ortiz Ahlf (Coord). *Derecho Internacional Público.* México: Porrúa. 130-134.

Von Bogdandy, A. (2019). El mandato transformador en el sistema interamericano de derechos humanos. In A. Von Bogdandy, E. Ferrer Mac Gregor, M. Morales Antoniazzi

(Coords.). *Ius Constitucionales Comune en America Latina.* Max Planck Institute for Comparative Public Law and Public International Law-Instituto de Estudios Constitucionales del Estado de Querétaro-UNAM, Mexico, 44ss.

Tribunals Cases

IACHR

Judgment

19 Merchants v. Colombia, Judgment on the Merits, Reparations and Costs, dated July 5, 2004.

Acosta Calderón v. Ecuador", Judgment of June 24, 2005.

Almonacid Arellano v. Chile, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated September 26, 2006.

Aloeboetoe et al. v. Suriname, Judgment on Reparations and Costs, dated September 10, 1993.

Artavia Murillo (In Vitro Fertilization) v. Costa Rica, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 28, 2012.

Balderón García v. Peru, Judgment of April 6, 2006.

Bámaca Velásquez vs. Guatemala, Judgment on Reparations and Costs, dated February 22, 2002.

Barrios Altos v. Peru, Judgment on Reparations and Costs, dated November 30, 2001
Benavides Cevallos v. Ecuador, dated June 19, 1998.
Blake v. Guatemala, Judgment on Reparations and Costs, dated January 22, 1999.
Bulacio v. Argentina", Judgment on Preliminary Objections, Merits, Reparations and Costs, dated September 18, 2003.
Bulacio v. Argentina, Judgment on the Merits, Reparations and Costs, dated September 18, 2003.
Buzos Miskitos (Lemoth Morris) v. Honduras, Judgment on the Merits and Reparations, dated August 31, 2021.
Caesar v. Trinidad and Tobago, Judgment on Merits, Reparations and Costs, dated March 11, 2005.
Cantoral Benavides v. Peru, Judgment on Reparations and Costs, dated December 3, 2001.
Carpio Nicolle v. Guatemala", Judgment of November 22, 2004.
Castañeda Gutman v. Mexico", Judgment dated August 6, 2008.
Castillo Paez v. Peru, Judgment on Reparations and Costs, dated November 27, 1998, p. 107;
Castillo Paez v. Peru, Judgment on Reparations and Costs, dated November 27, 1998.
Chitay Nech v. Guatemala, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated May 25, 2010.

Colindres Schonenberg v. El Salvador, Judgment on the Merits, Reparations and Costs, dated February 4, 2019.
Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) v. Colombia", Judgment of Preliminary Objections, Merits, Reparations and Costs, dated November 20, 2013.
De La Cruz Flores v. Peru, Judgment on the Merits, Reparations and Costs, dated November 18, 2004.
Displaced Afro-descendant Communities of the Cacarica River Basin (Operation Genesis) vs. Colombia", Judgment dated November 20, 2013.
Dominican and Haitian expelled persons vs. Dominican Republic, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated August 28, 2014.
Dos Erres Massacre v. Guatemala, Judgment of November 24, 2009.
Employees of the Fire Factory of Santo Antônio de Jesus vs. Brazil, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated July 15, 2020.
Espinoza Gonzales v. Peru, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 20, 2014.
Familia Pacheco Tineo v. Plurinational State of Bolivia, Judgment on Preliminary Objections, Merits, Reparations and

Costs, dated November 25, 2013.
Favela Nova Brasília v. Brazil, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated February 16, 2017.
Fernández Ortega v. Mexico", Preliminary Objections Judgment, Merits, Reparations and Costs, dated August 30, 2010.
Fernández Prieto and Tumbeiro v. Argentina, Judgment on the Merits and Reparations, dated September 1, 2020.
Garífuna Community of Punta Piedra and its members vs. Honduras, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated October 8, 2015.
Garrido and Baigorria v. Argentina", Judgment of August 27, 1998.
Gelman v. Uruguay, Judgment on the Merits and Reparations, dated February 24, 2011.
Goiburú v. Paraguay, Judgment on the Merits, Reparations and Costs, dated September 22, 2006.
González y Otros (Campo Algodonero) v. Mexico, Judgment dated November 16, 2009.
Guachalá Chimbo v. Ecuador, Judgment of March 26, 2021.
Gutiérrez Soler vs. Colombia, Judgment on the Merits, Reparations and Costs, dated September 12, 2005

Heliodoro Portugal v. Panama, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated August 12, 2008.
Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina, Judgment on Merits, Reparations and Costs, dated February 6, 2020.
Instituto de Reeducación del Menor v. Paraguay, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated September 2, 2004.
Ituango Massacres v. Colombia, Judgment of July 1, 2006.
Julien Grisonas Family v. Argentina, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated September 23, 2021.
Kaliña and Lokono Peoples v. Suriname, Judgment on the Merits, Reparations and Costs, dated November 25, 2015.
Kichwa Indigenous People of Sarayaku v. Ecuado", Judgment on the Merits and Reparations. Dated June 27, 2012.
La Cantuta v. Peru, Judgment on the Merits, Reparations and Costs, dated November 29, 2006.
Las Palmeras v. Colombia, Judgment of February 4, 2000.
Liakat Ali Alibux v. Suriname", Preliminary Objections Judgment, Merits, Reparations and Costs, dated January 30, 2014.

Loayza Tamayo v. Peru, Judgment on Reparations and Costs, dated November 27, 1998.
Mapiripán Massacre v. Colombia, Judgment of June 7, 2003.
Mapiripán Massacre v. Colombia, Judgment of September 15, 2005.
Massacres of El Mozote and nearby places v. El Salvador, Judgment on the Merits, Reparations and Costs, dated October 25, 2012.
Mendoza v. Argentina, Judgment on Preliminary Objections, Merits and Reparations, dated May 14, 2013.
Moiwana Community v. Suriname, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated June 15, 2005.
Montero Aranguren and others (Retén de Catia) v. Venezuela, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated July 5, 2006.
Mota Abarullo v. Venezuela, Judgment on the Merits, Reparations and Costs, dated November 18, 2020.
Myrna Mack Chang v. Guatemala", Judgment on the Merits, Reparations and Costs, dated November 25, 2003.
Nadege Dorzema v. Dominican Republic, Judgment dated October 24, 2012
Olivares Muñoz v. Venezuela, Judgment on the Merits, Reparations and Costs, dated November 10, 2020.

Plan de Sánchez Massacre v. Guatemala, Judgment on Reparations, dated November 19, 2004.
Pueblo Bello Massacre v. Colombia, Judgment dated January 31, 2006.
Radilla Pacheco v. Mexico, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 23, 2009.
Rio Negro Massacre v. Guatemala, Judgment dated September 5, 2012.
Río Negro Massacres v. Guatemala, Preliminary Objections Judgment, Merits, Reparations and Costs, dated September 4, 2012.
Rosendo Cantú v. Mexico", Preliminary Objections Judgment, Merits, Reparations and Costs, dated August 31, 2010.
Saramaka People v. Suriname, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 28, 2007.
Sawhoyamaxa Indigenous Community v. Paraguay, Judgment on the Merits, Reparations and Costs, dated March 29, 2006.
Street Children" (Villagrán Morales) v. Guatemala, Judgment of May 26, 2001.
Tibi v. Ecuador, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated September 7, 2004.
Ticona Estrada v. Bolivia, Judgment on the Merits, Reparations

and Costs, November 27, 2008.
Trabajadores Cesados del Congreso (Aguado Alfaro) v. Peru, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 24, 2006.
Triunfo de la Cruz Garífuna Community and its members v. Honduras, Judgment on the Merits, Reparations and Costs, dated October 8, 2015.
Trujillo Oroza v. Bolivia, Judgment on Reparations and Costs, Judgment of February 27, 2002.
V.R.P., V.R.P.C v. Nicaragua, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated March 8, 2018.
Velásquez Paiz v. Guatemala, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 19, 2015.
Velasquez Rodríguez v. Honduras, Judgment on Reparations and Costs, dated July 21, 1989.
Vélez Loor v. Panama, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated November 23, 2010.
Véliz Franco v. Guatemala, Preliminary Objections Judgment, Merits, Reparations and Costs, dated May 19, 2014.
Women Victims of Sexual Torture in Atenco v. Mexico, Preliminary Objection Judgment, Merits, Reparations and Costs, dated November 28, 2018.

Workers of the Hacienda Brasil Verde vs. Brazil", Judgment dated October 20, 2016.
Ximenes López v. Brazil, Judgment of July 4, 2006.
Xucuru Indigenous People and its members v. Brazil, Judgment on Preliminary Objections, Merits, Reparations and Costs. dated February 5, 2018.
Yakye Axa Indigenous Community v. Paraguay, Judgment on the Merits, Reparations and Costs, dated June 17, 2005.
Yatama v. Nicaragua, Judgment on Preliminary Objections, Merits, Reparations and Costs, dated June 23, 2005.